Office-Supreme Court, U.S.
FILED
OCT 26 1964
JOHN F. DAVIS, CLERK

SUPREME COURT, U.S.

No. 617

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

WALTER R. HEARNE and STANLEY E. WHITMAN,

*Appellants,*

*vs.*

ROBERT E. SMYLIE, Governor of the State of Idaho; ARNOLD WILLIAMS, Secretary of State, State of Idaho; ALLAN G. SHEPARD, Attorney General of the State of Idaho; JOE R. WILLIAMS, Auditor of the State of Idaho; MARJORIE RUTH MOON, Treasurer of the State of Idaho; LEON FAIRBANKS, MARVIN E. WRIGHT and ROY MURPHY, County Commissioners of Ada County, State of Idaho; VERN THOMAS, Auditor of the County of Ada, State of Idaho; EMMETTE SPRAKER, JAMES A. ABBOTT, and PAUL GREGERSEN, County Commissioners of Bannock County, State of Idaho; and SARAH DEVANEY, Auditor of the County of Bannock, State of Idaho,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR IDAHO, SOUTHERN DIVISION.

## JURISDICTIONAL STATEMENT

HERMAN J. McDEVITT,
McDEVITT & McDEVITT,
First Security Bank Building,
Pocatello, Idaho,
Attorney for Appellants.

# INDEX


| | PAGE |
|---|---|
| OPINION BELOW | 2 |
| JURISDICTION | 2 |
| UNITED STATES CONSTITUTION, FEDERAL STATUTES AND STATE CONSTITUTIONAL AND STATUTORY PROVISIONS | 3 |
| QUESTIONS PRESENTED | 3 |
| STATEMENT | 7 |
| THE QUESTION PRESENTED IS SUBSTANTIAL | 13 |
| CONCLUSION | 23 |
| APPENDIX A | 1a |
| APPENDIX B | 1b |


# CITATIONS

## Cases:


*Reynolds v. Sims, et. al.*, U.S. 12 L. Ed. 2d 506 ..... 2, 5, 6, 11, 13, 14, 15, 16, 18, 21, 22

*WMCA, Inc. v. Simon*, 370 U.S. 190 ..... 8

*Baker v. Carr*, 369 U.S. 237 ..... 13

*Brown v. Board of Education*, 347 U.S. 483 ..... 14

*Gray v. Saunders*, 372 U.S. 368 ..... 14

*Watson v. Memphis*, 373 U.S. 526 ..... 14, 18

*Roth v. Kaptowski*, 76 N.E. 2d 786 ..... 16

*Mutual Orange Distributors v. Agricultural Prorate Commission of California*, 30 F. Supp. 937 (D.C. Cal.) ..... 16

*Stonega Coke & Coal v. Price*, 116 F. 2d 18 (CCA W. Va.) 16

*Hampton v. Superior Court of Los Angeles County*, 242 P. 2d 138 ..... 16

*Taylor v. Interstate Motor Freight System*, 150 NYS 2d 84 16

*Braun v. Taub*, 171 F. 2d 649, cert. den. 193 L. Ed. 1725 ..... 16

*Sawyer v. City of Mobile*, 208 F. Supp. 548 ..... 18

*McCain v. Davis*, 217 F. Supp. 661 ..... 18

*Orleans Parrish School Board v. Bush*, 242 F. 2d 156 ..... 18

*Caesar v. Williams*, 371 P. 2d 241 ..... 21

## United States Constitution:


| | PAGE |
|---|---|
| Amendment XIV | 3, 6, 8, 9, 10, 19 |
| Article 4, § 4 | 3 |


## Federal Statutes:


| | |
|---|---|
| 28 USC § 1253 | 2 |
| 28 USC § 1343(3) | 3, 8 |
| 28 USC § 2201 | 3, 10 |
| 28 USC § 2202 | 3 |
| 42 USC § 1983 | 3, 8 |
| 42 USC § 1988 | 3, 8 |


## Idaho State Constitution:


| | |
|---|---|
| Article III, Sections 1, 2, 4 and 5 | 3, 7, 9, 10 |
| Article XX, Sections 1, 3 and 4 | 3 |
| 1911 House Joint Resolution 13 | 3, 9 |


## Idaho Statutes:


| | |
|---|---|
| Idaho Code Section 34-1801 | 3 |
| Idaho Code Section 67-202 | 3, 9, 10 |
| Idaho Code Section 67-203 | 3, 9, 10 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. _____

WALTER R. HEARNE and STANLEY E. WHITMAN,

*Appellants,*

*vs.*

ROBERT E. SMYLIE, Governor of the State of Idaho; ARNOLD WILLIAMS, Secretary of State, State of Idaho; ALLAN G. SHEPARD, Attorney General of the State of Idaho; JOE R. WILLIAMS, Auditor of the State of Idaho; MARJORIE RUTH MOON, Treasurer of the State of Idaho; LEON FAIRBANKS, MARVIN E. WRIGHT and ROY MURPHY, County Commissioners of Ada County, State of Idaho; VERN THOMAS, Auditor of the County of Ada, State of Idaho; EMMETTE SPRAKER, JAMES A. ABBOTT, and PAUL GREGERSEN, County Commissioners of Bannock County, State of Idaho; and SARAH DEVANEY, Auditor of the County of Bannock, State of Idaho,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR IDAHO, SOUTHERN DIVISION

## JURISDICTIONAL STATEMENT

## Opinion Below

The opinion of the three judge district court denominated "Order Staying Proceedings" on the merits and on all pending motions has not been reported and is attached as Appendix A.

## Jurisdiction

On January 10, 1964, the three-judge statutory court entered an order and judgment dismissing the complaint and supplemental complaint and a first notice of appeal to this Court was filed in the district court on Febrary 10, 1964. This Court reversed and remanded for further proceedings in conformance with *Reynolds vs. Sims, et al*, U.S. 12 L. Ed. 2d 506 on June 22, 1964. The three-judge statutory court on July 28, 1964, entered its Order Staying Proceedings, refusing to make a decision on the merits or on pending motions, and refusing to consider any further proceedings in the matter. The present Notice of Appeal was filed August 26, 1964. Jurisdiction of this Court to review on direct appeal the decision of the district court refusing to comply with this Court's remand, refusing to grant the injunction requested by Plaintiff's Motion After Notice and Hearing, and refusing to consider any further proceedings in the matter, is conferred by 28 U.S.C. 1253.

## United States Constitution, Federal Statutes and State Constitution and Statutes Involved

The pertinent provisions of the United States Constitution; 42 U.S.C. Sections 1983 and 1988; 28 U.S.C., Sections 1343 (3), 2201 and 2202; the Constitution of Idaho, Art. III, Sections 1, 2, 4 and 5, Art. XX, Sections 1, 3 and 4; 1911 House Joint Resolution 13; and Idaho State Law, Sections 34-1801, 67-202 and 67-203, as amended since 1917, are set forth in Appendix B, *infra*, pp. 1b-11b.

## Question Presented

The legislative apportionment of the State of Idaho is based upon the formula contained in the State Constitution and in the Statutes. Application of the combined formula results, and must necessarily result, in gross disproportion between the population and representation in both houses of the legislature. The Plaintiffs established, and defendants admitted, (a) that a representative from the most populous county represents 15.7 times as many citizens as the representative from the least populous county, and that the senator from the most populous county represents 100 times as many citizens as the senator from the least populous county, and (b) that the 1963 apportionment formula for the house of representatives allows one representative without full ratio up to 5,000 persons, and one additional representative for each full ratio

of 10,000 persons thereafter. Plaintiffs also established that there was no rational relationship between the apportionment in either the House or the Senate, and the geographic size or location of the county represented. Plaintiffs offered to prove that the 1911 amendment to the Idaho Constitution, by which each county was guaranteed one senator and one representative regardless of population, was invalidly adopted under the Idaho Constitution and decisions, and that the apportionment formulas adopted since 1911 had been specifically intended to limit the representation of the more populous counties without any basis in reason. After hearing the remand from the United States Supreme Court, and on the motions of the Defendant Governor of the State of Idaho, and the Plaintiffs, both praying, among other things, for a decision declaring the constitutionality or unconstitutionality of the various statutory and constitutional provisions on legislative apportionment in order that the legislature might be guided in its actions, and with no motions before the Court praying for a stay of proceedings, the district court refused to declare the applicable law as to the constitutional and statutory provisions of the state, and stayed all proceedings without relationship to any action of the legislature until thirty (30) days after the session.

The questions presented are:

1. Whether the district court erred under the June 22, 1964 opinion, of the United States Supreme Court,

in failing and refusing to give declaratory judgment interpreting the provisions of the constitution and statutes of the State of Idaho to any extent that they may be in conflict with the Fourteenth Amendment of the Constitution of the United States consistent with the views expressed in *Reynolds v. Sims*, U.S. 12 L. Ed. 2d 506, and other cases related to legislative apportionment decided therewith.

2. Whether the district court erred in failing and refusing to declare any invalidity of the Idaho Constitution and statutes insofar as they may be in conflict with the Fourteenth Amendment of the United States Constitution under the hereinabove referred to decision of the United States Supreme Court, thus requiring the Idaho legislature to remain bound by the portion of the said laws and constitution creating invalid apportionment in Idaho and in effect preventing the Idaho legislature, if it so desired, to enact apportionment as required by the Constitution of the United States.

3. Whether the district court erred in failing and refusing to make any decision on the motions of the plaintiffs and defendant Governor of the state of Idaho, for declaratory relief, and refusing to make any decision on the complaint and supplemental complaint, by staying all further proceedings wholly unrelated to whether or not the Idaho legislature might take any action for reapportionment for a period of thirty days after the adjournment of the regular session, which commences in January, 1965, or until further order

of the court, when there was no motion or request before the court by any party thereto for such stay.

4. Whether the District Court erred in failing and refusing to take any action declaring any portion of the Idaho constitution and statutes on reapportionment invalid as in conflict with the Fourteenth Amendment of the Constitution of the United States, and allowing until thirty days after the next regular session of the Idaho legislature, in view of the fact that the Governor of the State of Idaho had called a special session of the Idaho legislature to convene five days after the hearing before the district court, which legislative session was meeting under the 1951 apportionment act, and was not required by the call of such special session to act on reapportionment.

5. Whether the district court erred in failing and refusing under the above noted decision of the United States Supreme Court on remand to set forth standards or guidelines to be used by the Idaho legislature for enactment of a valid plan of apportionment in Idaho, or to adopt in its decision the mandate of this Court that the matter be decided in accordance with the decision in *Reynolds v. Sims, supra*, and related cases, thereby leaving the state legislature unguided by any order of the Court, and in fact bound by the present constitutional provisions which in themselves are mainly responsible for malapportionment in Idaho.

6. Whether the district court erred in expressly deciding that: ". . . further proceedings in conformity

with the opinion of the Supreme Court . . ." would not be possible at this time without seriously disrupting the election machinery of Idaho because of the imminence of the primary election on August 4 and the general election on November 3, 1964, based on an alleged disenfranchisement or diluting of the franchise of more persons than are presently deprived of such franchise by existing legislative apportionment, in the absence of existing pleadings or motions requesting such stay, and in the absence of any evidence submitted either at the earlier hearing in 1963, or at the time of the hearing in July, 1964, supporting any grounds for stay.

7. Whether the district court erred in failing and refusing to decide whether the 1911 Amendment to Article III, Section 2 of the Idaho Constitution, was validly adopted and failing and refusing to interpret the same if so validly adopted, and thereby failing to determine whether one senator and one representative must be elected from each county in Idaho, regardless of population, and effectively prohibiting the Idaho legislature from enacting any statutes which would establish constitutional apportionment plans, but be in contravention of uninterpreted constitutional provisions.

## Statement

A) The Complaint and Supplemental Complaint

This action was brought by the complaint filed Octo-

ber 31, 1962, and the supplemental complaint filed April 12, 1963, in the District Court for Idaho, Southern Division, under the Civil Rights Act, U.S.C. Title 42, §§1983 and 1988, and under U.S.C. Title 28, §1343. The appellants are citizens and voters residing respectively in the counties of Bannock and Ada. The suit is a class action brought on behalf of the named appellants and all other persons, citizens, taxpayers and qualified voters similarly situated.

The appellees are: the Governor, the Secretary of State, the Attorney General, the Auditor, and the Treasurer of the State of Idaho; and the other appellees are the three county commissioners and the auditor each of Ada and Bannock counties. The complaints alleged that all of the appellees perform official functions arising out of the legislative apportionment of the state and the conduct of elections pursuant to such apportionment.

The complaints alleged that the appellants are denied due process and equal protection of the law as guaranteed to them by the Fourteenth Amendment of the Constitution of the United States, by virtue of the provisions of the Idaho Constitution and the statutes in implementation thereof which provide for an apportionment of the State Senate and House of Representatives in a manner which is discriminatory to the residents of the more populous areas of the state.

---

The allegations of the complaint substantially parallel those of WMCA vs. Simon, 370 U.S. 190.

The complaint as supplemented contained three causes of action, the first of which alleged that the formula contained in the State constitution (Art. III, §§1, 2, 4 and 5) and statutes (Sections 67-202 and 203) currently results in an apportionment which deprives appellants of rights guaranteed by the Fourteenth Amendment. The second cause of action alleged that those provisions of the state constitution and statutes, together with the 1911 amendment (H.J.R. 13, 1911 S.L.) and various prior apportionment statutes from 1917 to 1963, were invalid and violative of the Fourteenth Amendment at the time of their adoption and constituted over the period a continuing systematic device to perpetuate majority control of both legislative houses by a minority of residents of Idaho, which constituted "affirmative legislative action" depriving appellants of rights guaranteed by the Fourteenth Amendment. The third cause of action alleged that those provisions of the state constitution and statutes currently resulted in an apportioned legislature which has chronically and systematically enacted laws grossly discriminatory against the residents of the more populous areas in economic, taxation and regulatory matters which deprive said persons of property without due process of law.

As examples of the result of the apportionment formula, the admitted facts establish that 17% of the population elects a majority of the senate with a range of one senator representing at the least 915 persons

to at the greatest 93,460 persons. In the house a representative represents 915 persons at the least to at the greatest 14,394 persons, under a formula which allows one representative without full ratio up to 5,000 persons, and one additional representative for each full ratio of 10,000 persons thereafter.

The relief sought by the complaints was that the district court declare, pursuant to 28 U.S.C. 2201, that Article III, §§ 2, 4 and 5, of the Constitution of Idaho, and Idaho Laws 67-202 and 67-203 are void and invalid under the Fourteenth Amendment of the Constitution of the United States; that the appellees be restrained from acting pursuant to said provisions, and that the court retain jurisdiction of the case until the state legislature provides for such apportionment of the state as would insure to appellants the rights guaranteed them by the Fourteenth Amendment.

B) The Prior Proceedings

The district court heard the cause on November 18 and 19, 1963, at which hearing it rejected as irrelevant appellants' offers to prove that: (a) the apportionment formula was specifically designed and intended to curtail the representation of residents of the more heavily populated areas of the state; and (b) that the malapportioned legislature in fact discriminated against such residents in levying taxes, allocating revenues, public

utility regulation and exercise of police powers. Under these exclusionary rulings of the court, appellants were permitted only to introduce, and did introduce, evidence of the existing apportionment and the apportionment which must necessarily result when the mandatory formula contained in the state constitution and laws is applied to the 1960 citizen census figures. The appellee county commissioners joined with appellants in asking the court for relief. No appellee called any witnesses, nor offered any evidence to justify or rationalize the gross disparities which exist in both senate and house between population and representation; some facts were stipulated or admitted.

On appeal from the decision of January 10, 1964, this court entered its reversal and remand on June 22, 1964, U.S. .On July 2, 1964, defendant Robert E. Smylie, Governor of the State of Idaho, filed his motion below requesting determination of the case on the merits in order that the provisions of the Idaho Constitution and statutes preventing compliance with *Reynolds v. Sims, supra*, and other cases, might be judicially determined and the legislature empowered to validly reapportion. On July 14, 1964, plaintiffs moved, among other things, for a decision on the merits and for an injunction of the imminent special session of the

legislature and any regular legislative session for any other purpose except reapportionment. All motions were heard by the court below on July 24, 1964, and on said day plaintiffs also filed their motion requesting immediate decision on the earlier Motion for Temporary Restraining Order and Injunction. The court on July 28, 1964, entered the order appealed from herein.

C) The Opinion Below

Confronted with the remand of this court directing further proceedings on the merits, and with the motions of plaintiffs and the defendant Governor for an immediate decision on the merits, the court below heard argument on these matters July 24, 1964. No party filed motions requesting any delay or stay of proceedings, and no evidence was presented to that end.

On this record, the three-judge District Court, *sua sponte*, entered its stay order reciting facts and conclusions not contended for by any party or based on any evidence before the court.

This terse order, set forth in Appendix A herein, relegates plaintiffs to the position from which they originally appealed to this court. That appeal was based on the refusal of the lower court to decide the case on the merits. Jurisdictional Statement, *Hearne et al v. Smylie et al*, October Term, 1963, No. 1075.

Under the terms of the stay order appealed from

herein, the lower court, by indefinite postponement of all proceedings in the case, has reinstated its former decision and persists in its refusal to comply with the remand of this court.

In this context, it should be noted that the order appealed from does not order reapportionment, in fact prevents it, and leaves to the malapportioned legislature complete control of when further proceedings may be had in this case.

## The Question is Substantial

The question presented is substantial because the Complaints and Motions upon which all proceedings have been stayed raise issues identical or substantially identical to those presented to this Honorable Court in *Reynolds vs. Sims*, 12 L ed. 2d 506, and the other reapportionment cases decided therewith. In this instance the three judge court below has failed to follow the requirement of *Baker vs. Carr*, 369 U.S. 237, holding that such Complaint presents "a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision," and the lower three-judge court has also, by the issuance of its order, indefinitely staying all proceedings, raised the question of the appropriateness and justification for denial of relief under the remand herein, and *Reynolds vs. Sims*, *supra*. As therein stated,

> "It is enough to say now that, once a state's legislative apportionment scheme is found to be uncon-

stitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan."

This Court has long recognized that once the deprivation of constitutional rights has been called to the attention of a federal court, the constitutional wrong should be immediately dealt with. *Brown vs. Board of Education*, 347 U.S. 483, 89 L ed. 873; *Gray vs. Saunders*, 372 U.S. 368, 9 L ed. 2d 821; *Watson vs. Memphis*, 373 U.S. 526, 10 L ed. 529. This Court has held any delay in giving relief is a significant departure from the ". . . usual principle that any deprivation of constitutional rights calls for prompt rectification." *Watson vs. Memphis*, 373 U.S. 534.

> "The basic guaranties of our constitution are warrants for the here and now, and unless there is an overwhelming, compelling reason, they are to be promptly fulfilled."
> (footnote 5, *Watson vs. Memphis*, 373 U.S. 533)

The earlier decision on the merits in this case, reported in 225 Fed Supp 645, was reversed and a remand for proceedings in conformance with *Reynolds vs. Sims*, *supra*, issued on June 20, 1964, in this matter. The earlier decision reversed held that the Plaintiffs were entitled to no relief by way of a declaratory judgment that the apportionment of the State of Idaho was improper, and entitled to no injunctive relief because there was no showing of irreparable injury. The Court

below has not proceeded in accordance with the remand of this Honorable Court by deciding the issue, and determining what relief should be granted, whether or not it may grant delay having made such decision. This stay on the frivolous grounds that any decision on the merits would interfere with the legislative and elective processes of the State of Idaho raises the substantial question of whether a lower court can deprive Plaintiffs, who have, on the face of their Complaint, stated a valid cause of action of malapportionment under *Reynolds vs. Sims*, *supra*, of any relief by merely staying all decision in the case and on any pending motions until such future date as the court or the malapportioned legislature may determine.

The lower court had a duty to follow the terms of this court's reversal and remand, based on the admitted facts. These admitted facts show that a house representative from the County with the largest number of persons per representative represents 15.7 times as many citizens as the house representative from the least populous county, and that a senator from the most populous county represents 100 times as many citizens as the senator from the least populous county. The admitted facts also show the 1963 apportionment formula for the house allows one representative without full ratio up to 5,000 persons, and additional representatives for each full ratio of 10,000 persons thereafter. The evidence clearly shows no rational relationship between such formulas and either the geographical

size or location of the particular county units. In *Reynolds vs. Sims, supra,* and the other apportionment cases decided therewith in the 1963 term, the discrimination in each such case was less than that of Idaho. Certainly, the Idaho Senate, where it is admitted that a majority is elected by 17% of the population is *per se* invidiously discriminatory. Under these facts the reversal and remand was not a directive for further proceedings such as a new trial, but in effect leaves the lower court with the case procedurally before it under Rule 52 of the Federal Rules of Civil Procedure, requiring findings and conclusions, and the entry of a judgment pursuant to Rule 58. The three-man District Court was bound by the reversal and remand of this Court with, in effect, directions to enter judgment in accordance with the view expressed in the specific opinions referred to. *Roth vs. Kaptowski*, 76 N.E. 2d 786, 7 ALR 2d 674; *Mutual Orange Distributors vs. Agricultural Prorate Commission of California*, 30 Fed Sup 937 (DC Cal.). The remand settled the law, leaving the court only the application of such law to its particular facts. *Stonega Coke & Coal vs. Price*, 116 Fed 2d 18 (CCA W.Va.) This matter thus falls within the well established rule that a lower court under a remand with explicit direction is without power to do anything else but to carry out such direction. *Hampton vs. Superior Court of Los Angeles County*, 242 P. 2d 138, Cal. 2d 652; *Taylor vs. Interstate Motor Freight System*, 150 NYS 2d 84; *Braun vs. Taub*, 171 Fed 2d 649 (CCA N.Y.) cert denied 69 Sup Ct. 1156, 193 L ed.

1725. Both the Plaintiffs and the Defendant Governor of the State of Idaho moved for an immediate decision after the June 22, 1964 reversal and remand, because of the primary election on August 4th and the general election on November 3, 1964. The Court has not acted on such motions, nor on the reversal and remand of this Honorable Court. There is thus presented the substantial question whether strict compliance with an appellate court's reversal and remand lies at the heart of our judicial system and is inherently a matter of fundamental substance.

In addition, a substantial question is presented, because following the reversal and remand in this case, the Governor of the State of Idaho called a Special Session of the legislature elected under the 1951 apportionment act to convene on the 29th day of July, 1964, to consider four major issues, but not calling the legislature to consider any action to reapportion itself. The motions of Plaintiffs for temporary injunction against such session pending decision raises the substantial question concerning how long a malapportioned legislature may continue to meet in special or other sessions after a reversal and remand such as occurred herein, before a local three-man District Court must act to protect the constitutional rights of the Plaintiffs. In addition, at the time of the hearing on the special motions for a decision by the Defendant Governor and the Plaintiffs, and the Plaintiff's motion for an injunction pendente lite, no defendant or any

third party moved for a stay of proceedings in the lower court. Thus, despite the fact that the admitted evidence in this action as applied to the law set forth in *Reynolds vs. Sims, supra*, and the other reapportionment cases, clearly showed an irreparable injury of a constitutional nature occurring to the Plaintiffs, the lower three-judge district court suspended the Constitutional rights of these Plaintiffs until some fortuitous time in the future when a decision may be rendered. Despite the citations by these Plaintiffs to the lower court of the cases delineating the circumstances under which a delay may be allowed once it appears that a constitutional right has been infringed, as cited above, and the specific holding of *Watson vs. Memphis, supra*, that "delay . . . cannot be upheld except upon the most convincing and impressing demonstration . . ." and that persons so claiming ". . . must sustain an extremely heavy burden of proof," 373 U.S. 533, an indefinite delay is allowed without any evidence or motion on the part of any of the defendants asking or supporting the same. See also *Sawyer vs. City of Mobile*, 208 Fed Sup 548; *McCain vs. Davis*, 217 Fed Sup 661, and *Orleans Parrish School Board vs. Bush*, 242 Fed 2d 156. Recalling again that the special session involved a house of representatives elected under a 1951 apportionment law which was approximately 30% less representative than the 1963 apportionment law and the fact that the special session was not called for the purpose of reapportionment, but involved amendments to the Idaho constitution on other matters (see

affidavits attached to Plaintiff's motion for temporary injunction), there is a substantial question raised of the wisdom of the lower court in not only refusing to grant the temporary injunction but even in the end refusing to decide on the merits whether the Idaho laws and statutes are constitutional.

A substantial question is further presented as to whether the lower three-judge district court can refuse for a second time to issue a judgment of declaration of constitutionality of the statutes and Constitution of the State of Idaho relating to apportionment, when the failure to at least declare the status of such constitution and statutory provisions leaves the legislature bound by them. The apportionment of the Senate is entirely governed by provisions in the Idaho Constitution, and the requirement of at least one representative per county for the House of Rpresentativs is also in the Idaho Constitution. How can any future legislature enact a new apportionment plan when no decision has been rendered by the lower court that the present plan does not meet the standards of equal protection of the law required by the 14th amendment? The argument that the Idaho legislature may adopt constitutional amendments to be submitted to the people at the next general election in November, 1966, and which would be effective for legislative apportionment for the election held in November of 1968, ignores the fact that there is no certainty that the legislature need even consider a constitutional amendment when the

lower court has not held anything unconstitutional. Secondly, justice so long delayed is justice denied. Due to such delay, the election of the legislature in November of 1964 and the meeting of the regular session in January of 1965 under the present malapportioned representation without the lower court rendering any decision on the merits in this matter, demonstrates the arbitrary and willful abuse of discretion of the lower court in refusing to act to protect the constitutional rights of the Plaintiffs and in failing to obey the remand of this Court. Considering the fact that the lower court acted on its own motion in granting a stay order, even over the motion of the Defendant Governor, who must know what the law is in order to make a proper submission of apportionment plans to the regular session of the legislature, it is apparent that the lower three judge district court has placed itself in disobedience to the reversal and remand of this Honorable Court.

As pointed out in the jurisdictional statement filed before this Court in the October term, 1963, and the earlier appeal in this matter, Case No. 1075, there is no initiative to amend the Idaho Constitution, a constitutional amendment and a constitutional convention to amend the constitution both requiring a two-thirds vote of both houses of the legislature. The minority control of the house and substantial minority control of the senate clearly indicates that no such two-thirds vote can be obtained for either purpose. The

Idaho Supreme Court has held that the Idaho Constitution, ". . . destroys any possibility of representation based solely on a per capita or per voter basis . . ." and that ". . . disparity of representation stems from the constitution." *Caesar vs. Williams*, 371 P. 2d 241, 248-9. The futility of referring appellants to a political remedy is obvious where the very evil complained of in this action renders that political remedy ineffective. Since any relief from the malapportionment of the Idaho Senate and House is prevented by the express provisions of the Idaho Constitution, the refusal of the court below to render a declaratory judgment on the constitutionality of these provisions is to provide the majority of the representatives and senators elected by a minority of the people with little reason and certainly no incentive to try to decide on a new apportionment system for the State of Idaho. As reported on July 18, 1964, in the Idaho Daily Statesman, 16 senators from the greatly over-represented counties met and issued a joint statement to the effect that the decision in *Reynolds vs. Sims, supra*, and the other reapportionment cases, . . . "has amended the constitution of the United States and the State of Idaho by judicial fiat, and the net effect in Idaho is to grant complete legislative control of all of the state to the hands of 5 or 6 counties." And the same issue reported that such senators were "hopping mad" and that ". . . they would like to find a way to circumvent the court's ruling." Without an order of the lower court, declaring the constitutionality of the provisions of the con-

stitution and the statutes of the State of Idaho, there can be little doubt that the legislature is not going to take any action.

A substantial question is also tendered to this Court in the wording of the stay order issued by the three-judge district court. The stay on all proceedings, which must include both the Complaint, the supplemental Complaint, the motions for immediate decision, the motion for a temporary injunction, and any future motions, are stayed until 30 days after the adjournment of the 1965 legislature. When the 1965 legislature will adjourn is only a matter of conjecture, and such adjournment could be continued until the end of the two-year terms for which the legislators are elected. Perhaps the legislature could recess for two years. It is not a question, as was presented in *Reynolds vs. Sims, supra*, of whether or not the next election should be held under a constitutional apportionment plan, but a question of how many legislatures the Plaintiffs must suffer through under the present malapportioned system before the lower three-judge court decides that it should issue a declaratory judgment and such relief as it may believe appropriate, under the pleadings of the parties. While in the first decision of this case by the three-judge district court, it avoided decision on the merits by refusing to exercise its discretion under the declaratory judgment act, finding that it was impossible to fashion any effective equitable relief, the same court now refuses to act on the grounds it might

interfere with the regular elective process and the legislative process of the state of Idaho if it enters any decision in this case. This is merely a new guise for the nullification of the constitutional rights which appellants seek to enforce by this action. Again, it is to this Honorable Court which appellant must now look as the sole possible source of redress for the deprivation of rights so fundamental to a democratic society.

## CONCLUSION

*It is submitted that the Court has jurisdiction and should hear this appeal, or, in its discretion, without briefs and oral argument, should summarily reverse the decision below, and remand the case for a decision on the merits.*

Respectfully submitted,

McDEVITT AND McDEVITT

By: .....
Attorneys for Appellant
Pocatello, Idaho

October 21, 1964

# APPENDIX A

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO SOUTHERN DIVISION

Civil No. 3815

WALTER R. HEARNE and
STANLEY E. WHITMAN,

*Plaintiffs,*

v.

ROBERT E. SMYLIE, Governor of the State of Idaho; ARNOLD WILLIAMS, Secretary of State, State of Idaho; ALLAN G. SHEPARD, Attorney General of the State of Idaho; JOE R. WILLIAMS, Auditor of the State of Idaho; MARJORIE RUTH MOON, Treasurer of the State of Idaho; LEON FAIRBANKS, MARVIN E. WRIGHT and ROY MURPHY, County Commissioners of Ada County, State of Idaho; VERN THOMAS, Auditor of Ada County, State of Idaho; EMMETTE SPRAKER, JAMES A. ABBOTT, and PAUL L. GREGERSEN, County Commissioners of Bannock County, State of Idaho; and SARAH DEVANEY, Auditor of the County of Bannock, State of Idaho,

*Defendants.*

## ORDER STAYING PROCEEDINGS

The Mandate of the United States Supreme Court having been received on July 20, 1964; and it appearing to the court:

(1) That Idaho's primary election is to be held on August 4, 1964, and therefore "an impending election is imminent and . . . [the] State's election machinery is already in progress" [*Reynolds etc, et al v. Sims et al,* U.S. ; 32 Law Week 4535, 4550 (6-15-'64)];

(2) That it would not be possible at this time to take further proceedings in conformity with the opinion of the Supreme Court, which would not be reasonably certain to disrupt seriously the election machinery established for the August 4th primary election and the forthcoming general election in November, and thus disenfranchise, or dilute the franchise, of far more persons than would reasonably be expected to result from continuing the existing legislative apportionment system until after the next session of the Idaho Legislature in January of 1965; Accordingly

IT IS ORDERED That decision on all pending motions is reserved, and all further proceedings in this action are hereby stayed, until the expiration of the period of thirty (30) days next following adjournment of the next regular session of the Legislature of

the State of Idaho in January of 1965, or until further order of Court.

Filed July 28, 1964.

United States Circuit Judge

United States District Judge

United States District Judge

# APPENDIX B

## UNITED STATES CONSTITUTION, FEDERAL STATUTES AND STATE CONSTITUTIONS AND STATUTES INVOLVED

### UNITED STATES CONSTITUTION:

**Amendment XIV, § 1:**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.***

### FEDERAL STATUTES:

U.S.C., Title 42, Sections 1983 and 1988:

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§ 1988. Proceedings in vindication of civil rights.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

U.S.C., Title 28, Section 1343, (3):

§ 1343. Civil rights and elective franchise.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:***

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all

persons within the jurisdiction of the United States;

The Federal Declaratory Judgment Act

U.S.C., Title 28, Sections 2201 and 2202:

§ 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. Further relief.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

THE CONSTITUTION OF THE STATE OF IDAHO

ARTICLE III—LEGISLATIVE DEPARTMENT

§ 1. Legislative power—Enacting clause—Referendum—Initiative.—The legislative power of the state shall be vested in a senate and house of representatives. The enacting clause of every bill shall be as follows: "Be it enacted by the Legislature of the State of Idaho."

The people reserve to themselves the power to ap-

prove or reject at the polls any act or measure passed by the legislature. This power is known as the referendum, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, demand a referendum vote on any act or measure passed by the legislature and cause the same to be submitted to a vote of the people for their approval or rejection.

The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature. This power is known as the initiative, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection provided that legislation thus submitted shall require the approval of a number of voters equal to a majority of the aggregate vote cast for the office of governor at such general election to be adopted.

Membership of house and senate.—The senate shall consist of one (1) member from each county. The legislature may fix the number of members of the house of representatives at not more than three (3) times as many representatives as there are senators. The senators and representatives shall be chosen by the electors of the respective counties or districts into which the state may, from time to time, be divided by law.

As originally adopted, Article III, Section 2 of the

Constitution of the State of Idaho provided as follows:

§ 2. The senate shall consist of eighteen members and the house of representatives of thirty-six members. The legislature may increase the number of senators and representatives: provided, the number of senators shall never exceed twenty-four, and the house of representatives shall never exceed sixty members. The senators and representatives shall be chosen by the electors of the respective counties or districts into which the state may from time to time be divided by law.

House Joint Resolution No. 13, proposing the 1911 amendment to the Idaho Constitution provided as follows:

SECTION 1. That Section 2 of Article III of the Constitution of the State of Idaho be amended to read as follows:

'Sec. 2. The Senate shall consist of one member from each county of the state now created or hereafter to be created and the House of Representatives shall consist of not to exceed three times the number of Senators. The Senators shall be chosen by the electors of the respective counties and the Representatives shall be chosen by electors of the respective counties or districts into which the state may from time to time be divided by law.'

"SECTION 2. The question to be submitted to the electors of the State of Idaho at the next general election shall be as follows, to-wit:

" 'Shall Section 2 of Article III of the Constitution of the State of Idaho, be amended so as to provide that the Senate shall consist of one member from each of the counties of the state now created or which may hereafter be created, and the House of Representatives consist of not to exceed three times the number of Senators?'

§ 4. Apportionment of legislature.—The members of the first legislature shall be apportioned to the several legislative districts of the state in proportion to the number of votes polled at the last general election for delegate to congress, and thereafter to be apportioned as may be provided by law: provided, each county shall be entitled to one representative.

§ 5. Senatorial and representative districts. — A senatorial or representative district, when more than one county shall constitute the same, shall be composed of contiguous counties, and no county shall be divided in creating such districts.

## ARTICLE XX—AMENDMENTS

§ 1. How amendments may be proposed. — Any amendment or amendments to this Constitution may be proposed in either branch of the legislature, and if the same shall be agreed to by two-thirds of all the members of each of the two houses, voting separately, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals, and it shall be the duty of the legislature to submit

such amendment or amendments to the electors of the state at the next general election, and cause the same to be published without delay for at least six consecutive weeks, prior to said election, in not less than one newspaper of general circulation published in each county; and if a majority of the electors shall ratify the same, such amendment or amendments shall become a part of this Constitution.

§ 3. Revision or amendment by convention. — Whenever two-thirds of the members elected to each branch of the legislature shall deem it necessary to call a convention to revise or amend this Constitution, they shall recommend to the electors to vote at the next general election, for or against a convention, and if a majority of all the electors voting at said election shall have voted for a convention, the legislature shall at the next session provide by law for calling the same; and such convention shall consist of a number of members, not less than double the number of the most numerous branch of the legislature.

§ 4. Submission of revised constitution to people. —Any Constitution adopted by such convention, shall have no validity until it has been submitted to, and adopted by, the people.

STATE STATUTES: IDAHO CODE SECTION 34-1801:

34-1801. Petition. — The following shall be sub-

stantially the form of petition for any law proposed by the initiative:

WARNING

It is a felony for any one to sign any initiative or referendum petition with any name other than his own, or to knowingly sign his name more than once for the measure, or to sign such petition when he is not a legal voter.

INITIATIVE PETITION

To the Honorable . . . . . , Secretary of State of the State of Idaho: We, the undersigned citizens and legal voters of the State of Idaho, respectfully demand that the following proposed law, to-wit: (setting out full text of the measure proposed) shall be submitted to the legal voters of the State of Idaho, for their approval or rejection at the regular general election, to be held on the . . . . . day of . . . . . , A.D., 19 . . . , and each for himself says: I have personally signed this petition; I am a legal voter of the State of Idaho; my residence and postoffice are correctly written after my name.

Name Residence. Postoffice.

(If in a city, street and number.)

(Here follow twenty numbered lines for signatures.)

The petition for referendum on any act passed by the state legislature of the State of Idaho shall be substan-

tially the same form with appropriate title and changes, setting out in full the text of the act of the legislature to be referred to the people for their approval or rejection.

SECTION 67-202:

67-202. Senatorial districts.—Each county in the state now existing or hereafter created shall constitute a senatorial district and shall elect one senator.

SECTION 67-203 AS PRESENTLY ENACTED:

67-203. Representative districts. — The several counties shall elect members of the house of representatives as follows: Each county shall elect one (1) representative for the first five thousand (5,000) population and one (1) additional representative for each additional ten thousand (10,000) population of such county. Population for this purpose shall be determined solely according to the last official United States census; provided that there shall be at least one (1) representative from each county.

SECTION 67-203 AS ENACTED IN 1951:

67-203. Representative districts. — The several counties shall elect members of the house of representatives as follows: Each county shall elect one representative for each * *seventeen* thousand * * * population of such county and remaining fraction thereof amounting to * three thousand population or more. Population for this purpose shall be determined solely according

to the last official United States Census; provided that there shall be at least one representative from each county.

SECTION 67-203 AS ENACTED IN 1941:

67-203. Representative districts. — The several counties shall elect members of the house of representatives as follows: Each county shall elect one representative for each twelve thousand five hundred population of such county and remaining fraction thereof amounting to five thousand population or more. Population for this purpose shall be determined solely according to the last official United States Census; provided that there shall be at least one representative from each county.

SECTION 67-203 AS ENACTED IN 1933:

REPRESENTATIVE DISTRICTS.—The several counties shall elect members of the house of representatives as follows: Each county shall elect one representative for each * * * *ten thousand population of such county* and remaining fraction thereof amounting to * * * *five thousand population or more. Population for this purpose shall be determined solely according to the last official United States Census;* provided, that there shall be at least one representative from each county.

SECTION 67-203 AS ENACTED IN 1917:

The apportionment of the houses of the Legislature is and shall be as follows:

Each county in the State of Idaho and any county which may hereafter be created shall constitute a senatorial district and shall elect one senator.

The several counties shall elect members of the House of Representatives as follows: Each county shall elect one representative for each 2,500 votes and remaining fraction thereof amounting to 1,000 votes or more cast in said county at the last general election, based on the total vote cast for all candidates for Governor: *Provided,* That there shall be at least one representative from each county. It shall be the duty of the Secretary of State to certify to the county auditor of each county on or before the first day of April, 1918, and biennially thereafter the number of representatives in the Legislature said county will be entitled to elect at the following election. When any new counties have been created, subsequent to the last general election for Governor, the total vote cast for Governor in the territory included in any such new county and in the territory remaining in any county or counties from which said new county or counties have been created shall be estimated by the Secretary of State as nearly as possible from the election returns and the legislative apportionment figured thereon.

LIBRARY

Office-Supreme Court, U.S.
FILED
NOV 27 1964
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term, 1964

No. 617

WALTER R. HEARNE AND STANLEY E. WHITMAN,

*Appellants,*

vs.

ROBERT E. SMYLIE, Governor of the State of Idaho; ARNOLD WILLIAMS, Secretary of State, State of Idaho; ALLAN G. SHEPARD, Attorney General of the State of Idaho; JOE R. WILLIAMS, Auditor of the State of Idaho; MARJORIE RUTH MOON, Treasurer of the State of Idaho; LEON FAIRBANKS, MARVIN E. WRIGHT and ROY MURPHY, County Commissioners of Ada County, State of Idaho; VERN THOMAS, Auditor of the County of Ada, State of Idaho; EMMETTE SPRAKER, JAMES A. ABBOTT, and PAUL GREGERSEN, County Commissioners of Bannock County, State of Idaho; and SARAH DEVANEY, Auditor of the County of Bannock, State of Idaho.

*Appellees.*

**On appeal from the United States District Court for Idaho, Southern Division**

## MOTION TO DISMISS OR AFFIRM

ALLAN G. SHEPARD
Attorney General of the State of Idaho

M. ALLYN DINGEL, JR.
Assistant Attorney General of the State of Idaho

Counsel for Appellees, ARNOLD WILLIAMS, ALLAN G. SHEPARD, JOE R. WILLIAMS, MARJORIE RUTH MOON.

227 State House
Boise, Idaho

IN THE

# Supreme Court of the United States

October Term, 1964

No.

WALTER R. HEARNE AND STANLEY E. WHITMAN,

*Appellants,*

vs.

ROBERT E. SMYLIE, Governor of the State of Idaho; ARNOLD WILLIAMS, Secretary of State, State of Idaho; ALLAN G. SHEPARD, Attorney General of the State of Idaho; JOE R. WILLIAMS, Auditor of the State of Idaho; MARJORIE RUTH MOON, Treasurer of the State of Idaho; LEON FAIRBANKS, MARVIN E. WRIGHT and ROY MURPHY, County Commissioners of Ada County, State of Idaho; VERN THOMAS, Auditor of the County of Ada, State of Idaho; EMMETTE SPRAKER, JAMES A. ABBOTT, and PAUL GREGERSEN, County Commissioners of Bannock County, State of Idaho; and SARAH DEVANEY, Auditor of the County of Bannock, State of Idaho.

*Appellees.*

## MOTION TO DISMISS OR AFFIRM

Appellees, Arnold Williams, Allan G. Shepard, Joe R. Williams and Marjorie R. Moon, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the appeal herein be dismissed on the ground hereinafter set forth, or, in the alternative, that the stay order of the court below be affirmed, on the grounds hereinafter set forth.

## ARGUMENT

### I.

### APPELLANTS' APPEAL SHOULD BE DISMISSED

Appellants have pursued their appeal under 28 U.S.C. (1958). Attached as Appendix A on pages 1 (a) to 3 (a) of their jurisdictional brief, is the July 28, 1964 order of the three-judge statutory court staying the proceedings in the instant matter:

> "IT IS ORDERED That decision on all pending motions is reserved and all further proceedings in this action are hereby stayed, until the expiration of the period of thirty (30) days next following adjournment of the next regular session of the Legislature of the State of Idaho in January of 1965, *or until further order of Court.*" (Emphasis added.)

These appellees believe appellants' present appeal should be dismissed because they have not shown that the stay order falls within the specific appeal requirements of 1253 of being an order, "granting or denying . . . an interlocutory or permanent injunction." Appellees admit that the appealability of stay orders in Federal Courts is an area of appellate procedure which is in a state or flux. The subject is discussed in the May 1963 edition of 47 *Minnesota Law Review*, beginning on page 1099. Since the lower court's action is claimed by appellants to have dealt them "irreparable injury" (Appellants' Jurisdictional Brief, page 18). it is apparent that appellants have recognized the difficulty of appealing a stay order, and that only in circumstances where the court's stay order in effect constitutes "serious and irreparable" injury to a party does it then fall within the allowed realm of 28 U.S.C. $ 1253.

Appellants on page 2 of their jurisdictional brief claim that the three-judge court refused to make a decision on the pending motions. They repeatedly assert that the lower court's grant of a stay order was improper when there was no motion or request before that court to do so. (Plaintiff's Jurisdictional Brief, pages 5-6, 7, 12, 18, and 20.) Appellees cannot comprehend appellants' argument because it is well recognized that a judicial body may issue a stay order on its own motion. Appellants also contend that at the hearing on July 24, 1964, there was an absence of any evidence indicating grounds for the stay. Counsel for these appellees did submit oral argument to the court in support of a stay and that the court did direct discussion to counsel on the topic.

Appellees believed there was a request already before the court to consider staying the proceedings. Appellants note on page 11 of their Jurisdictional Brief that the defendant, Robert E. Smylie, Governor of the State of Idaho, filed a motion on July 2, 1964. In that motion that defendant prayed that the court conduct a hearing in order that compliance might be had in the case at bar with the opinion of this Court in Reynolds v. Sims 377 U. S. 533, 84 S. C. 1362 (1964). 12 L. Ed 2d 506 (1964). In addition, in the order of July 20, 1964, the Clerk of the Federal District Court notified all counsel that the case, "had been set for further proceedings in conformity with the Opinion and Judgment of the Supreme Court of the United States, including hearings on the Petition of the defendant, Robert E. Smylie, Governor

of the State of Idaho * * *", and that such would be considered on July 24, 1964.

On pages 1393-94 of 84 S. Ct. the majority of this Court in *Reynolds v. Sims* said:

> "We do not consider here the difficult question of the proper remedial devices which federal courts should utilize in state legislative apportionment cases. Remedial technique in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions. It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such a where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely, upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree. As stated by Mr. Justice Douglas, in concurring in Baker v. Carr, 'any relief accorded can be fashioned in the light of well-known principles of equity.'"

"We feel that the District Court in this case acted in a most proper and commendable manner. It in-

itially acted wisely in declining to stay the impending primary election in Alabama, and properly refrained from acting further until the Alabama Legislature had been given an opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme, while initially stating some of its views to provide guidelines for legislative action. *And it correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination*, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an *adequate opportunity to do so.*" (Emphasis added.)

This Court in its *per curiam* opinion of July 22, 1964, in reversing the lower court's decision in the instant matter specifically remanded the case;

> "for further proceedings consistent with the views stated in our opinion in Reynolds v. Sims and in other cases relating to state legislative apportionment decided along with Reynolds."

In light of the above closing remarks of this Court in *Reynolds v. Sims* and understanding defendant Robert E. Smylie's request for the lower court to conduct further proceedings consistent with the views stated in *Reynolds v. Sims*, these appellees were of the opinion that the lower court would assuredly consider any arguments directed towards a stay of the proceedings which were mentioned so vividly in *Reynolds v. Sims.*

These appellees believe the Supreme Court of the United States should dismiss the appeal of the stay order.

## II.

## THE STAY ORDER OF THE LOWER COURT SHOULD BE AFFIRMED

It is manifest that the questions on which the decision of this case depends are so unsubstantial as to not to need further argument. The stay order of the lower court specifically adopted the exact language of the majority in *Reynolds v. Sims*, in stating that, "an impending election is imminent and * * * [the] States' election machinery is already in progress." Appellees have quoted extensively from the concluding remarks of the majority in *Reynolds v. Sims*. At the risk of repetition, appellees wish to bring to the attention of this Court that, on page 1394 of 84 S. Ct. the majority commended the decision of the district court in Alabama to stay the impending primary election and the action in refraining from acting further until the Alabama legislature first had been given the opportunity of remedying the state's legislative apportionment discrepancies. Continuing on the same page this Court enunciated:

> ". . . it is correctly recognized that legislative reapportionment is primarly a matter for legislative consideration and determination and that judicial relief becomes appropriate only when a legislature fails to apportion according to Federal constitutional requisites in a timely fashion, after having had an *adequate* opportunity to do so." (Emphasis added.)

The five additional legislative apportionment decisions which were handed down by this Court on June 15, 1964, were remanded for further proceedings consistent with the views stated in the opinion of *Reynolds*

*v. Sims.* The Delaware reapportionment suit of *Roman v. Sinock*, 377 U. S. 695, 12 L. Ed. 620, 84 S. Ct. 1462 commended on page 1470 of 84 S. Ct. the lower court's action:

> "In giving the Delaware Legislature an opportunity to adopt a constitutionally valid plan of legislative apportionment, and in deferring decision until after the November, 1962, general election, because of the imminence of that election, and the disruptive effect which a decision might have had, the District Court acted in a wise and temperate manner."

Apparently the lower tribunal in the instant matter of *Hearne v. Smylie* had faith in the ability and integrity of the Idaho legislature to meet the vexing problem of legislative reapportionment. Examination of the history of the Idaho legislature reveals that the lower court's faith is not ill-founded. The Idaho legislature has periodically reapportioned itself, doing so in 1917, 1933, 1941, 1951. Subsequent to the commencement of this litigation, the Idaho legislature in 1963 reapportioned the House of Representatives on the basis of the 1960 Census. As noted, by the lower court (225 F. Sup. at pages 615-52) the legislative action followed a decision of the Idaho Supreme Court in the reapportionment suit of *Ceasar v. Williams*, 84 Idaho 254, 271 P. 2d 241 (1962). This conduct of the Idaho legislature vividly demonstrates that appellants' repeated accusations in their Jurisdictional Brief belittling the integrity of the Idaho lawmakers is without foundation. House Bill No. 50, which reapportioned the House of Representatives in 1963, thereby giving counties with larger populations additional representation, was pass-

ed by the House with 57 ayes, 2 nays and 4 excused. The bill passed the Senate with 39 ayes, 2 nays and 3 excused. This overwhelming vote displays a great wealth of bipartisanship that tarnishes, if not totally destroys, any such contention of appellants.

Furthermore, the special session of the Idaho legislature which met in August of this year, enacted House Bill No. 4:

> "SECTION 1. There is hereby appropriated from the General Fund of the State of Idaho to the Legislative Council the sum of $20,000.00, or so much thereof as may be necessary, for the purpose of conducting a study of the problem of reapportioning the Idaho Legislature. The Council shall complete the study and make report thereon to the membership of the Legislature at the earliest possible date.
>
> SECTION 2. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be effective from and after its approval."

The Legislative Council has hired additional employees and has been, and is, presently, actively engaged in complying with the directive of the Legislature.

Appellants contend that the lower court's order suspends their constitutional rights until some "fortuitous" time in the future (Appellants' Jurisdictional Brief page 18). On the same page they state "an indefinite delay is allowed without any evidence or motion on part of any of the defendants asking or supporting the same." Then, in the same breath, appellants propose the preposterous contention that the stay

order of the lower court could be applied by the legislature in such a manner that this legislative body would never adjourn. Appellants submit that this legislature body for which counsel for appellants is the house minority floor leader, is of better material than appellants disrespectfully suggest.

The final phrase of the lower court's stay order was that the proceedings would be stayed "until further order of the Court." If the Idaho legislature at any stage abdicates its political responsibility surely the lower court has power to step in and rectify the situation. For appellants to suggest that Federal District Court in the instant matter would allow the proceedings to continue in the manner suggested by appellants attacks the honesty and competence of that court.

## CONCLUSION

This Court, on November 16, 1964, in *Scranton v. Drew*, Opinion No. 201, vacated the lower court's judgment which had held invalid the Pennsylvania constitution and statutory apportionment provisions. This Court referred to the September 29, 1964, decision of the Supreme Court of Pennsylvania, *Butcher v. Bloom* Pa. , 203 A.2d 556, wherein the Pennsylvania Court stated:

> "We have indicated that it is our expectation that the Legislature will proceed in timely fashion to enact reapportionment laws which conform to constitutional requirements. We must recognize, however, that if the General Assembly fails to act in a timely fashion, we shall be obliged to take necessary affirmative action to insure that the 1966 election of Penn-

sylvania legislators will be conducted pursuant to a constitutionally valid plan. Proper regard for our responsibility compels us to retain jurisdiction of this matter pending legislative action.

Should the Legislature fail to enact a constitutionally valid plan of reapportionment as soon as practical, but not later than September 1, 1965, we shall take such action as may be appropriate in light of then then existing situation.

Jurisdiction retained in accordance with this opinion."

Appellees submit that the circumstances of *Butcher v. Bloom* are analogous to those existing in the instant matter. Thus, these appellees request the Supreme Court of the United States to dismiss appellants' appeal or in the alternative to affirm the order of the lower court staying these proceedings.

Respectfully submitted

---

ALLAN G. SHEPARD,
*Attorney General,*
State of Idaho

---

M. ALLYN DINGEL, JR.,
*Assistant Attorney General*
State of Idaho

Counsel for Appellees, ARNOLD WILLIAMS, ALLAN G. SHEPARD, JOE R. WILLIAMS, MARJORIE RUTH MOON.

## PROOF OF SERVICE

I, Allan G. Shepard, Attorney General of the State of Idaho, and one of the Attorneys for Appellees, ARNOLD WILLIAMS, ALLAN G. SHEPARD, JOE R. WILLIAMS, MARJORIE RUTH MOON *herein*, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of November, 1964, I served copies of the foregoing Motion to Dismiss or Affirm on the several parties thereto by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

MCDEVITT & MCDEVITT
First Security Bank Building
Pocatello, Idaho
*Attorneys for Appellants.*

ELAM, BURKE, JEPPESEN & EVANS
Bank of Idaho Building
Boise, Idaho
*Attorneys for Appellee Robert E. Smylie*

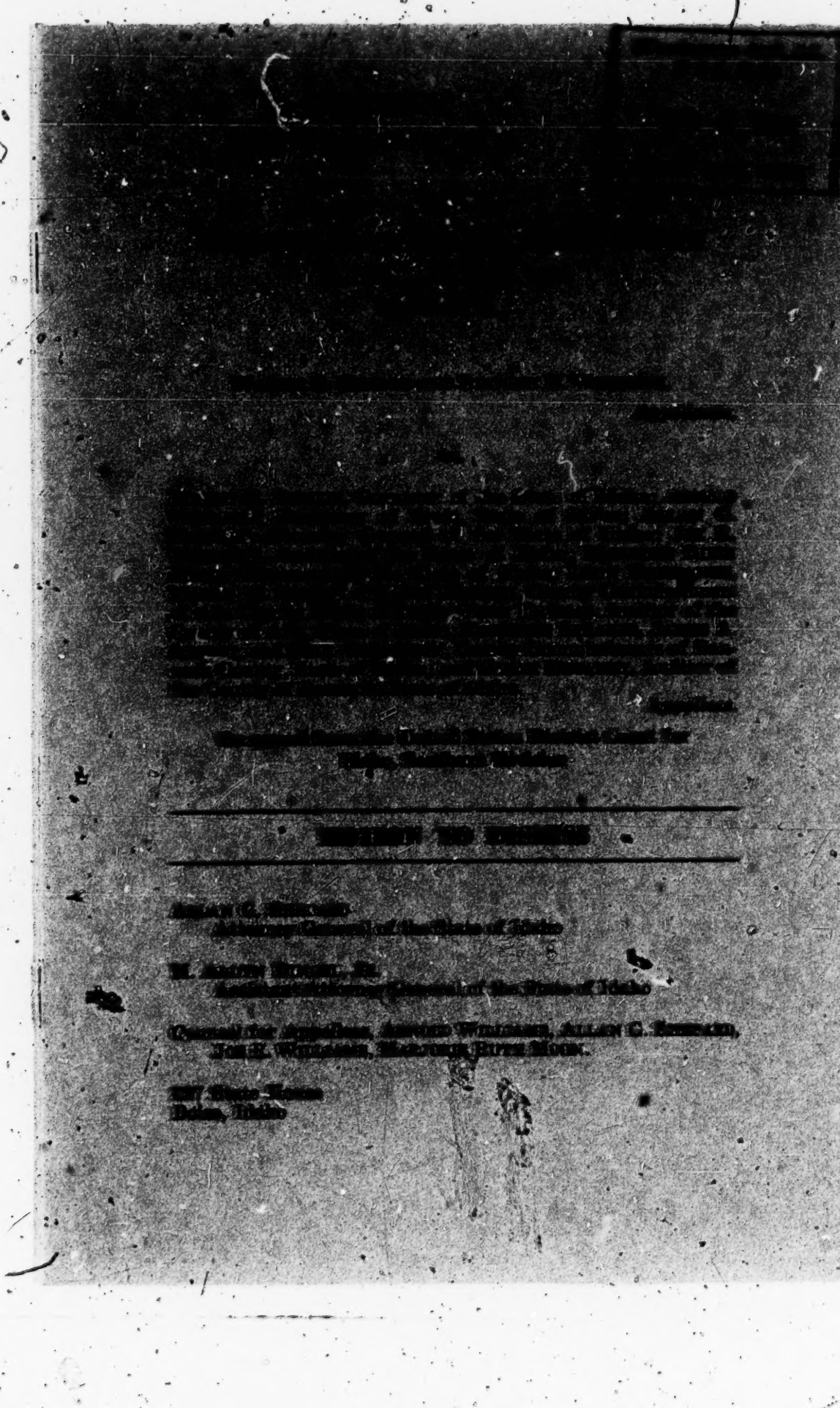
MARTIN V. HUFF, *Prosecuting Attorney*
Ada County Court House
Boise, Idaho
*Attorney for Appellees* Leon Fairbanks, Marvin E. Wright, Roy Murphy and Vern Thomas.

HUGH MAGUIRE,
*Prosecuting Attorney*
Bannock County Court House
Pocatello, Idaho
*Attorney for Appellees* Emmette Spraker, James A. Abbott, Paul Gregersen and Sarah Devaney.

DONART & WESTON,
Idaho First National Bank Building,
Weiser, Idaho,
*Attorneys for Amicus Curiae*

---

ALLAN G. SHEPARD,
*Attorney General*
State of Idaho



IN THE

# Supreme Court of the United States

_____ Term, 1965

No_____

WALTER R. HEARNE AND STANLEY E. WHITMAN,

*Appellants,*

vs.

ROBERT E. SMYLIE, Governor of the State of Idaho; ARNORD WILLIAMS, Secretary of State, State of Idaho; ALLAN G. SHEPARD, Attorney General of the State of Idaho; JOE R. WILLIAMS, Auditor of the State of Idaho; MARJORIE RUTH MOON, Treasurer of the State of Idaho; LEON FAIRBANKS, MARVIN E. WRIGHT and ROY MURPHY, County Commissioners of Ada County, State of Idaho; VERN THOMAS, Auditor of the County of Ada, State of Idaho; EMMETTE SPRAKER, JAMES A. ABBOTT, and PAUL GREGERSEN, County Commissioners of Bannock County, State of Idaho; and SARAH DEVANEY, Auditor of the County of Bannock, State of Idaho.

*Appellees.*

**On appeal from the United States District Court for Idaho, Southern Division**

## MOTION TO DISMISS

Appellees, Arnold Williams, Allan G. Shepard, Joe R. Williams and Marjorie R. Moon, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the appeal herein be dismissed on the ground that the instant appeal has become moot.

### ARGUMENT

Appellees, Arnold Williams, Allan G. Shepard, Joe R. Williams, and Marjorie Ruth Moon believe the in-

stant appeal pursued by appellants is now academic by reason of changing circumstances. Appellants' appeal is now meaningless and hollow because the subject matter of their appeal has become moot as explained below.

The three-judge statutory court in the instant matter of legislative reapportionment of the Legislature of the State of Idaho, handed down on July 28, 1964, the following Stay Order:

"The Mandate of the United States Supreme Court having been received on July 20, 1964; and it appearing to the Court:

"(1) That Idaho's primary election is to be held on August 4, 1964, and therefore 'an impending election is imminent and . . . [the] State's election machinery is already in progress' [*Reynolds etc. et al v. Sims et al,* U. S. 32 Law Week 4535, 4550 (6/15/'64)];

"(2) That it would not be possible at this time to take further proceedings in conformity with the opinion of the Supreme Court, which would not be reasonably certain to disrupt seriously the election machinery established for the August 4th primary election and the forthcoming general election in November, and thus disenfranchise, or dilute the franchise, of far more persons than would reasonably be expected to result from continuing the existing legislative apportionment system until after the next session of the Idaho Legislature in January of 1965; Accordingly

*"IT IS ORDERED That decision on all pending motions is reserved, and all further proceedings in this action are hereby stayed, until the expiration of the period of thirty (30) days next following adjournment of the next regular session of the Legislature of the State of Idaho in January of 1965, or until further order of Court."* (Emphasis added.)

The appellants on August 26, 1964, filed their Notice of Appeal contending that the above Stay Order was improper. Appellants filed their Jurisdictional Statement and these appellees filed in response thereto, their Motion to Dismiss or Affirm.

This Court on February 1, 1965, in Opinion No. 617, 185 S. Ct. 713, speaking in regard to the instant appeal said in a Per Curiam decision:

> "This cause is continued on the docket until the Court Conference of May 21, 1965, before which time the parties are asked to advise the Court by supplemental briefs as to the progress made in reapportioning the Idaho Legislature."

The Thirty-Eighth Session of the Idaho Legislature adjourned March 18, 1965. By Proclamation of the Governor, read to the members of the Legislature immediately prior to the adjournment of the regular session, the Legislature was called into an extraordinary session at nine o'clock a.m. the following day, March 19, 1965. Pursuant to this call, both branches of the Legislature convened at said time and date. The Governor's call requested the Legislature:

"To consider the passage of, and to enact, legislation reapportioning the membership of the Idaho State Senate and the membership of the Idaho State House of Representatives among the several counties in conformance with the Constitution of the United States."

It would be unwarranted criticism for one to suggest that the Legislature was ill prepared for this task and had not anticipated the monumental work in that venture. As an example, the First Extraordinary Session of the Thirty-Seventh Session of the Idaho State Legislature met in August of last year and enacted House Bill No. 4:.

"SECTION 1. There is hereby appropriated from the General Fund of the State of Idaho to the Legislative Council, the sum of $20,000.00, or so much thereof as may be necessary, for the purpose of conducting a study of the problem of reapportioning the Idaho Legislature. *The Council shall complete the study and make report thereon to the membership of the Legislature at the earliest possible date.*" (Emphasis added.)

The Legislative Council hired additional employees and immediately engaged itself in complying with the Legislature's directive. After extensive work the Legislative Council on November 28, 1964, submitted to the members of the Thirty-Eighth Session of the Idaho Legislature of the State of Idaho its written and compiled report relating to reapportionment. Included in

the report were 70 plans pertaining to reapportionment of the House of Representatives and Senate of the Idaho Legislature.

The First Extraordinary Session of the Thirty-Eighth Session of the Idaho Legislature adjourned last Thursday, March 25, 1965, only six days after convening.

The proposals concerning reapportionment were not discussed in the six days with tirades approaching attitudes of indecision, passion and irascibility, but instead the special session was marked with debate of an orderly and mature fashion. The Legislature recognized the problem of reapportionment and examined possible solutions at considerable length.

The said special session enacted House Bill No. 3, which reapportioned the House of Representatives and Senate Bill No. 11 which reapportioned the Senate. The enacted apportionment plans obviously demanded amendments to the election law machinery to assure that the complex election mechanism could operate in line with reapportionment. Readily recognizing this problem, the Legislature enacted Senate Bill No. 10 which amended the election code of the State of Idaho.

Even if the Idaho Legislature had not acted with dispatch as it so did, the instant appeal would in all practicality, be moot because the thirty-day period specifically stated in the Stay Order of the three-judge statutory court would have expired April 17, 1965,

only eighteen days from the date of these appellees' present motion to dismiss.

These appellees wish to emphasize that the *only topic* raised by appellants in their instant appeal is directed solely at the Stay Order of the three-judge statutory court. Thus, this Court does not have before it the question of the validity of the present legislative apportionment of the State of Idaho; nor does this Court have before it the question of the validity of the new apportionment statutes. By the very wording of the Stay Order, those questions lie with the three-judge panel, and that judicial body will consider such in the very near future. The single issue now before this Court is whether or not the Stay Order was proper. These appellees submit that this issue is now of no import and is, therefore, moot.

## CONCLUSION

It would be folly to suggest that the Stay Order issued by the three-judge statutory court was not for the explicit purpose of granting the Idaho Legislature the opportunity of remedying the alleged discrepancies in Idaho's legislative apportionment. The Stay Order seemed only apropos in light of this Court's language in *Reynolds v. Sims*, 377 U. S. 533, , 84 S. Ct. 1362, 1394, 12 L. Ed.2d 506, 541:

> ". . . it is correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination and that judicial

relief becomes appropriate only when a legislature fails to apportion according to Federal constitutional requisites in a timely fashion, after having had an *adequate* opportunity to do so." (Emphasis added.)

These appellees believe that the three-judge statutory court will have before it for consideration on the merits at an early date, the new reapportionment statutes, House Bill No. 3 and Senate Bill No. 11.

Thus, for the reasons stated above, the instant appeal has become moot. These appellees request and desire this court to dismiss the appeal in order that the present litigation may be heard in the proper forum: the United States District Court for the District of Idaho, Southern Division. Appeal, if such there be, from the three-judge statutory court will then provide this Court with the opportunity to review the legislative apportionment of the State of Idaho.

Respectfully submitted

ALLAN G. SHEPARD,
*Attorney General,*
State of Idaho

M. ALLYN DINGEL, JR.,
*Assistant Attorney General*
State of Idaho
Counsel for Appellees, ARNOLD WILLIAMS, ALLAN G. SHEPARD, JOE R. WILLIAMS, MARJORIE RUTH MOON.

## PROOF OF SERVICE

I, Allan G. Shepard, Attorney General of the State of Idaho, and one of the Attorneys for Appellees, ARNOLD WILLIAMS, ALLAN G. SHEPARD, JOE R. WILLIAMS, MARJORIE RUTH MOON *herein*, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the . . . day of March, 1965, I served copies of the foregoing Motion to Dismiss on the several parties thereto by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

MCDEVITT & MCDEVITT
First Security Bank Building
Pocatello, Idaho
*Attorneys for Appellants.*

ELAM, BURKE, JEPPESEN & EVANS
Bank of Idaho Building
Boise, Idaho
*Attorneys for Appellee Robert E. Smylie*

MARTIN V. HUFF, *Prosecuting Attorney*
Ada County Court House
Boise, Idaho
*Attorney for Appellees* Leon Fairbanks, Marvin E. Wright, Roy Murphy and Vern Thomas.

HUGH MAGUIRE,
*Prosecuting Attorney*
Bannock County Court House
Pocatello, Idaho
*Attorney for Appellees* Emmette Spraker, James A.

Abbott, Paul Gregersen and Sarah Devaney.
DONART & WESTON,
Idaho First National Bank Building,
Weiser, Idaho,
*Attorneys for Amicus Curiae*

ALLAN G. SHEPARD,
*Attorney General*
State of Idaho

LIBRARY

Office-Supreme Court, U.S.
FILED
APR 19 1965
JOHN F. DAVIS, CLERK

No. 617

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

WALTER R. HEARNE and STANLEY E. WHITMAN,

*Appellants,*

*vs.*

ROBERT E. SMYLIE, Governor of the State of Idaho; ARNOLD WILLIAMS, Secretary of State, State of Idaho; ALLAN G. SHEPARD, Attorney General of the State of Idaho; JOE R. WILLIAMS, Auditor of the State of Idaho; MARJORIE RUTH MOON, Treasurer of the State of Idaho; LEON FAIRBANKS, MARVIN E. WRIGHT and ROY MURPHY, County Commissioners of Ada County, State of Idaho; VERN THOMAS, Auditor of the County of Ada, State of Idaho; EMMETTE SPRAKER, JAMES A. ABBOTT, and PAUL GREGERSEN, County Commissioners of Bannock County, State of Idaho; and SARAH DEVANEY, Auditor of the County of Bannock, State of Idaho,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR IDAHO, SOUTHERN DIVISION

## Reply To Second Motion To Dismiss

HERMAN J. McDEVITT,
McDEVITT & McDEVITT,
First Security Bank Building,
Pocatello, Idaho,
Attorney for Appellants.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 617

WALTER R. HEARNE and STANLEY E. WHITMAN,

*Appellants,*

*vs.*

ROBERT E. SMYLIE, Governor of the State of Idaho; ARNOLD WILLIAMS, Secretary of State, State of Idaho; ALLAN G. SHEPARD, Attorney General of the State of Idaho; JOE R. WILLIAMS, Auditor of the State of Idaho; MARJORIE RUTH MOON, Treasurer of the State of Idaho; LEON FAIRBANKS, MARVIN E. WRIGHT and ROY MURPHY, County Commissioners of Ada County, State of Idaho; VERN THOMAS, Auditor of the County of Ada, State of Idaho; EMMETTE SPRAKER, JAMES A. ABBOTT, and PAUL GREGERSEN, County Commissioners of Bannock County, State of Idaho; and SARAH DEVANEY, Auditor of the County of Bannock, State of Idaho,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR IDAHO, SOUTHERN DIVISION

## Reply To Second Motion To Dismiss

## Reply To Second Motion To Dismiss

The Appellants herein herewith reply to the Motion to Dismiss of Appellees filed in March, 1965, and as grounds in opposition thereto state that the said Motion does not comply with the Rules of this Court, that the same was prematurely filed, and does not set forth any grounds upon which relief may be granted.

## Argument

The Motion does not comply with Rule 16 of this Court. It is not timely filed within thirty (30) days of the Jurisdictional Statement, which was filed October 26, 1964. It is not based on the grounds allowed in said Rule. The Second Motion to Dismiss also must be considered within the facts that the Appellants waived their reply to the first Motion to Dismiss and this Court entered its Order of February 1, 1965, continuing this cause on the docket until the Court Conference of May 21, 1965. By said Order, a request for report on reapportionment in Idaho was made, and the present Motion to Dismiss by the named Appellees makes no report on reapportionment other than to note the passage of statutory amendments by the Idaho Legislature without description of the same.

The basis of the Motion is in error. It alleges that as the time in the original Stay Order is about to expire, the appeal herein should be dismissed. Even if Appellee's interpretation of the Stay Order, that it automatically expires as of April 17, 1965, is correct, the

Motion is improperly taken until such time. However, a reading of the Stay Order does not indicate that the Court will act on or at any particular date after April 17. The order very clearly indicates that the stay will continue until April 17 ". . . or until further order of the Court." This could be before or after April 17, requiring affirmative action of the three-judge statutory court. No such action is reported by said Motion, nor has it occurred.

The Motion is premature. The various amendments reportedly passed by the recent special session of the Legislature had not been enacted into law at the date of the filing of said Motion, the Governor not signing the same until April 2, 1964. It is premature on the ground noted above, that the Stay Order is still in effect.

The Motion to Dismiss is further without grounds upon which it can be granted, for the reason that there are presented in the appeal herein questions wholly apart from when, and if, the Stay Order expires. Recalling that this Court reversed and remanded from the Decision of January 10, 1963 of the three-judge statutory court, the Appeal notes the failure of such Court to comply with said mandate. The Appeal also notes in "Questions Presented" the refusal of the three-judge statutory court to take any affirmative action herein. Even if the three-judge statutory court was justified in withholding the granting of equitable relief because of elections in the fall of 1964, its failure

to grant declaratory relief prayed for is not so excused. A declaration of the rights of appellants under the Fourteenth Amendment and establishment of guidelines was required, and the appeal raises the issue of the failure of the court below to so act. Finally, questions presented include the issues as to the 1911 Amendment to the Idaho Constitution, and as to failing to make any decision as to the Special Session in August, 1964, held for general business five days after the hearing upon which the Stay Order was given. It is obvious that many of the questions presented are hardly moot. In addition to his motion to dismiss in this court, the appellee Attorney General has filed a motion to dismiss appellant's complaint in the lower court upon the grounds that the Idaho legislature has validly reapportioned itself. Said motion ignores the present state of the pleadings in this court, in which this court has in effect noted probable jurisdiction, thus removing the proceedings in their entirety from the jurisdiction of the lower court.

## Conclusion

Reference is made to the Supplemental Brief of Appellants filed concurrently herewith, reporting in detail the failure of the Idaho Legislature to validly reapportion itself. Based on the above statements and those set forth in said Supplemental Brief, it is respectfully submitted that there are no grounds presented by the second Motion to Dismiss upon which any relief can be granted. As noted in the Conclusion to the Mo-

tion to Dismiss, it in effect is a prayer for further Stay Order in hopes that after the lengthy proceedings herein, the three-judge statutory court may finally provide some relief for the appellant. As is pointed out in detail in the Supplemental Brief, appellants submit that without adequate directions from this Court, such relief will continue to be delayed.

Respectfully submitted,

McDEVITT & McDEVITT

By:

A Member of the Firm
Attorneys for Appellants

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 19 1965
JOHN F. DAVIS, CLERK

No. 617

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

WALTER R. HEARNE and STANLEY E. WHITMAN,

*Appellants,*

*vs.*

ROBERT E. SMYLIE, Governor of the State of Idaho; ARNOLD WILLIAMS, Secretary of State, State of Idaho; ALLAN G. SHEPARD, Attorney General of the State of Idaho; JOE R. WILLIAMS, Auditor of the State of Idaho; MARJORIE RUTH MOON, Treasurer of the State of Idaho; LEON FAIRBANKS, MARVIN E. WRIGHT and ROY MURPHY, County Commissioners of Ada County, State of Idaho; VERN THOMAS, Auditor of the County of Ada, State of Idaho; EMMETTE SPRAKER, JAMES A. ABBOTT, and PAUL GREGERSEN, County Commissioners of Bannock County, State of Idaho; and SARAH DEVANEY, Auditor of the County of Bannock, State of Idaho,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR IDAHO, SOUTHERN DIVISION

## SUPPLEMENTAL BRIEF OF APPELLANTS

HERMAN J. McDEVITT,
McDEVITT & McDEVITT,
First Security Bank Building,
Pocatello, Idaho,
Attorney for Appellants.

# INDEX


| | PAGE |
|---|---|
| Opinion Below | 2 |
| Jurisdiction | 2 |
| United States Constitution, Federal Statutes and State Constitutional and Statutory Provisions | 3 |
| Questions Presented | 3 |
| Statement | |
| A) Complaint and Supplemental Complaint | 8 |
| B) Prior Proceedings | 11 |
| C) Opinion Below | 12 |
| Summary of Argument | 13 |
| Argument | |
| I. History of Inability to Obtain Relief From Malapportioned Legislature in Idaho | 17 |
| II. Idaho Legislature has Failed to Reapportion Itself | 24 |
| III. Idaho Legislative Apportionment Invidiously Discriminates against Appellants and is the Result of the Constitution and Statutes of Idaho | 31 |
| IV. Directions to Court Below to Grant Relief Should be Order | 37 |
| Conclusion | 39 |
| Appendix AA | 1AA |


# CITATIONS

CASES:


| | |
|---|---|
| Baker v. Carr, 369 U.S. 186, 7 L. Ed. 2d 663 | 18 |
| Caesar v. Williams, 371 P. 2d 241, 84 Ida 254 | 17 |
| Gray v. Saunders, 372 U.S. 368, 9 L. Ed. 2d 821 | 34, 35 |
| Hearne et al v. Smylie et al. October Term, 1963, No. 1075 | 13 |

PAGE

Lucas v. Colorado General Assembly, ... U.S. ..., 12 L. Ed. 2d 632 ... 33, 34, 37

Maryland Committee on Fair Apportionment v. Tawes, ... U.S. ..., 12. L. Ed. 2d 595 at 606 ... 32, 34

Moss v. Burkhart, 20 Fed. Supp. 149, ... U.S. ...; 12 L. Ed. 2d 821, 83 S. Ct. 801 ... 34, 37

Reynolds v. Sims, U.S. 12 L. Ed. 2d 506 ... 2, 5, 7, 12, 20, 21, 23, 24

Watson v. Memphis, 373 U.S. 534, ... L. Ed. 2d ... 17

WMCA v. Lomenzo, ... U.S. ..., 12 L. Ed. 2d 569 9, 34, 35, 36

## United States Constitution and Federal Statutes:

United States Constitution, Federal Statutes and Idaho Constitutional provisions are set forth in Appendix B, Jurisdictional Statement, filed herein.

## Idaho Statutes: Set Forth in Appendix AA

Amendments to:

Idaho Code Section 67-202 ...

Idaho Code Section 67-203 ... 1AA

Idaho Code Section 34-605 ... 2AA

Idaho Code Section 34-606 ... 3AA

Idaho Code Section 34-608 ... 9AA

Idaho Code Section 34-612A ... 10AA

Idaho Code Section 34-634 ... 12AA

Idaho Code Section 34-636 ... 12AA

Idaho Code Section 34-637 ... 13AA

Idaho Code Section 34-646 ... 14AA

Idaho Code Section 34-648 ... 15AA

Idaho Code Section 34-904A ... 17AA

Senate Bill 11 (Amending Idaho Code Section 67-202) ... 19AA

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 617

WALTER R. HEARNE and STANLEY E. WHITMAN,

*Appellants,*

*vs.*

ROBERT E. SMYLIE, Governor of the State of Idaho; ARNOLD WILLIAMS, Secretary of State, State of Idaho; ALLAN G. SHEPARD, Attorney General of the State of Idaho; JOE R. WILLIAMS, Auditor of the State of Idaho; MARJORIE RUTH MOON, Treasurer of the State of Idaho; LEON FAIRBANKS, MARVIN E. WRIGHT and ROY MURPHY, County Commissioners of Ada County, State of Idaho; VERN THOMAS, Auditor of the County of Ada, State of Idaho; EMMETTE SPRAKER, JAMES A. ABBOTT, and PAUL GREGERSEN, County Commissioners of Bannock County, State of Idaho; and SARAH DEVANEY, Auditor of the County of Bannock, State of Idaho,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR IDAHO, SOUTHERN DIVISION

## SUPPLEMENTAL BRIEF OF APPELLANTS

## Opinion Below

The opinion of the three judge statutory court denominated "Order Staying Proceedings" on the merits and on all pending motions has not been reported and is attached as Appendix A to the Jurisdictional Statement filed herein.

## Jurisdiction

On January 10, 1964, the three-judge statutory court entered an order and judgment dismissing the complaint and supplemental complaint and a first notice of appeal to this Court was filed in the district court on February 10, 1964. This Court reversed and remanded for further proceedings in conformance with *Reynolds vs. Sims, et al,* U.S. , 12 L. Ed. 2d 506, on June 22, 1964. The three-judge statutory court on July 28, 1964, entered its Order Staying Proceedings, refusing to make a decision on the merits or on pending motions, and refusing to consider any further proceedings in the matter until 30 days after adjournment of the legislature. The Notice of Appeal was filed August 26, 1964. This Court noted probable jurisdiction and retained the matter on the docket until the conference of May 21, 1965, requesting the parties to advise this Court by supplemental briefs the progress made in reapportionment of the Idaho Legislature. U. S. , 13 L. ed. 2d 298. Jurisdiction of this Court is conferred by 28 U.S.C. 1253.

## United States Constitution, Federal Statutes and State Constitution and Statutes Involved

The pertinent provisions of the United States Constitution; 42 U.S.C. Sections 1983 and 1988; 28 U.S.C., Sections 1343 (3), 2201 and 2202; the Constitution of Idaho, Art. III, Sections 1, 2, 4 and 5, Art. XX, Sections 1, 3 and 4; 1911 House Joint Resolution 13; and Idaho State Law, Sections 34-1801, 67-202 and 67-203, as amended since 1917, are set forth with the Jurisdictional Statement in Appendix B, pp. 1b-11b thereof.

Additional statutes passed by the Idaho Legislature in 1965 have not been published or codified. Involved are House Bill No. 3, House Concurrent Resolution No. 4, Senate Bill No. 10, and Senate Bill No. 11, which are set forth in Appendix AA, infra, pp. laa-aa.

## Questions Presented

There has been no change in the questions presented set out in the Jurisdictional Statement, either as to the Constitutional and Statutory provisions of the State of Idaho, or the procedural questions. The amendments to the statutes passed by the First Extraordinary Session of the 38th Legislature meeting in March of 1965 raise the same issues as to apportionment, the Senate having in effect maintained the *status quo* and the House of Representatives having only lessened its malapportionment. The amendments are mainly to the same statutes which Appellants originally alleged re-

sult in invidious discrimination against voting rights of the citizens living in the more populous areas.

The legislative apportionment of the State of Idaho is determined by a formula contained in the State Constitution and implemented by statute. Application of that formula results, and must necessarily result, in gross and arbitrary disproportions between the population and representation in both houses of the legislature, and systematically discriminates against the Plaintiffs and those similarly situated in the more heavily populated areas of the State. As is presently established by the acts of the 38th Session (a) a representative of the most persons in a representative district for the House represents 1.49 times as many citizens as a representative of the least persons, based on representation per representative, and (b) a senator from the most populous county represents 100 times as many persons as the senator from the least populous county. There is no rational relationship between the 27 electoral districts for the House of Representatives or the nine electoral districts for the Senate, and the geographic size and location of any county or of the location and layout of the electoral districts. In addition, there is presented to the Court the issues of the 1911 Amendment to the Idaho Constitution by which each county is guaranteed one Senator and one Representative regardless of population, which was invalidly adopted under the Idaho Constitution and decisions, and that the apportionment formulas adopted since

1911 had been specifically intended to limit the representation of the more populous counties without any basis in reason. After the remand of the United States Supreme Court, and on the motions of the Defendant Governor of the State, and the Plaintiffs, both praying, among other things, for a decision as to the constitutionality of various statutory and constitutional provisions on apportionment of the legislature, in order that the legislature might be guided in its actions, and with no motions being before the Court, praying for a stay of proceedings, the District Court refused to declare the applicable law as to the constitutional and statutory provisions of the State, and stayed all proceedings without relationship to any action of the legislature until thirty days after the session.

The questions presented are:

1. Whether the district court erred under the June 22, 1964 opinion, of the United States Supreme Court, in failing and refusing to give declaratory judgment interpreting the provisions of the constitution and statutes of the State of Idaho to any extent that they may be in conflict with the Fourteenth Amendment of the Constitution of the United States consistent with the views expressed in *Reynolds v. Sims*, U.S. , 12 L. Ed. 2d 506, and other cases related to legislative apportionment decided therewith.

2. Whether the district court erred in failing and refusing to declare any invalidity of the Idaho Consti-

tution and statutes insofar as they may be in conflict with the Fourteenth Amendment of the United States Constitution under the hereinabove referred to decision of the United States Supreme Court, thus requiring the Idaho legislature to remain bound by the portion of the said laws and constitution creating invalid apportionment in Idaho and in effect preventing the Idaho legislature, if it so desired, to enact apportionment as required by the Constitution of the United States.

3. Whether the district court erred in failing and refusing to make any decision on the motions of the plaintiffs and defendant Governor of the state of Idaho, for declaratory relief, and refusing to make any decision on the complaint and supplemental complaint, by staying all further proceedings wholly unrelated to whether or not the Idaho legislature might take any action for reapportionment for a period of thirty days after the adjournment of the regular session, which commenced in January, 1965, or until further order of the court, when there was no motion or request before the court by any party thereto for such stay.

4. Whether the District Court erred in failing and refusing to take any action declaring any portion of the Idaho constitution and statutes on reapportionment invalid as in conflict with the Fourteenth Amendment of the Constitution of the United States, and allowing until thirty days after the next regular session of the Idaho legislature, in view of the fact that the Governor of the State of Idaho had called a special session of the

Idaho legislature to convene five days after the hearing before the district court, which legislative session was meeting under the 1951 apportionment act, and was not required by the call of such special session to act on reapportionment.

5. Whether the district court erred in failing and refusing under the above noted decision of the United States Supreme Court on remand to set forth standards or guidelines to be used by the Idaho legislature for enactment of a valid plan of apportionment in Idaho, or to adopt in its decision the mandate of this Court that the matter be decided in accordance with the decision in *Reynolds v. Sims, supra*, and related cases, thereby leaving the state legislature unguided by any order of the Court, and in fact bound by the present constitutional provisions which in themselves are mainly responsible for malapportionment in Idaho.

6. Whether the district court erred in expressly deciding that: ". . . further proceedings in conformity with the opinion of the Supreme Court . . ." would not be possible at this time without seriously disrupting the election machinery of Idaho because of the imminence of the primary election on August 4 and the general election on November 3, 1964, based on an alleged disenfranchisement or diluting of the franchise of more persons than are presently deprived of such franchise by existing legislative apportionment, in the absence of existing pleadings or motions requesting such stay, and in the absence of any evidence submitted

either at the earlier hearing in 1963, or at the time of the hearing in July, 1964, supporting any grounds for stay.

7. Whether the district court erred in failing and refusing to decide whether the 1911 Amendment to Article III, Section 2 of the Idaho Constitution, was validly adopted and failing and refusing to interpret the same if so validly adopted, and thereby failing to determine whether one senator and one representative must be elected from each county in Idaho, regardless of population, and effectively prohibiting the Idaho legislature from enacting any statutes which would establish constitutional apportionment plans, but be in contravention of uninterpreted constitutional provisions.

8. Whether the apportionment scheme as amended by the recent 38th Idaho legislature is invidiously discriminatory under the Fourteenth Amendment.

## Statement

A) The Complaint and Supplemental Complaint

This action was brought by the complaint filed October 31, 1962, and the supplemental complaint filed April 12, 1963, in the District Court for Idaho, Southern Division, under the Civil Rights Act, U.S.C. Title 42, §§1983 and 1988, and under U.S.C. Title 28, §1343. The appellants are citizens and voters residing respectively in the counties of Bannock and Ada. The suit is

a class action brought on behalf of the named appellants and all other persons, citizens, taxpayers and qualified voters similarly situated.

The appellees are: the Governor, the Secretary of State, the Attorney General, the Auditor, and the Treasurer of the State of Idaho; and the other appellees are the three county commissioners and the auditor each of Ada and Bannock counties. The complaints alleged that all of the appellees perform official functions arising out of the legislative apportionment of the state and the conduct of elections pursuant to such apportionment.

The complaints alleged that the appellants are denied due process and equal protection of the law as guaranteed to them by the Fourteenth Amendment of the Constitution of the United States, by virtue of the provisions of the Idaho Constitution and the statutes in implementation thereof which provide for an apportionment of the State Senate and House of Representatives in a manner which is discriminatory to the residents of the more populous areas of the state.

The complaint as supplemented contained three causes of action, the first of which alleged that the formula contained in the State constitution (Art. III, §§1, 2, 4 and 5) and statutes (Sections 67-202 and 203). currently results in an apportionment which deprives

---

[1]The allegations of the complaint substantially parallel those of WMCA vs. Simon, 370 U.S. 190.

appellants of rights guaranteed by the Fourteenth Amendment. The second cause of action alleged that those provisions of the state constitution and statutes, together with the 1911 amendment (H.J.R. 13, 1911 S.L.) and various prior apportionment statutes from 1917 to 1963, were invalid and violative of the Fourteenth Amendment at the time of their adoption and constituted over the period a continuing systematic device to perpetuate majority control of both legislative houses by a minority of residents of Idaho, which constituted "affirmative legislative action" depriving appellants of rights guaranteed by the Fourteenth Amendment. The third cause of action alleged that those provisions of the state constitution and statutes currently resulted in an apportioned legislature which has chronically and systematically enacted laws grossly discriminatory against the residents of the more populous areas in economic, taxation and regulatory matters which deprive said persons of property without due process of law.

The relief sought by the complaints was that the district court declare, pursuant to 28 U.S.C. 2201, that Article III, §§ 2, 4 and 5, of the Constitution of Idaho, and Idaho Laws 67-202 and 67-208 as amended are void and invalid under the Fourteenth Amendment of the Constitution of the United States; that the appellees be restrained from acting pursuant to said provisions, and that the court retain jurisdiction of the case until the state legislature provides for such apportion-

ment of the state as would insure to appellants the rights guaranteed them by the Fourteenth Amendment.

B) The Prior Proceedings

The district court heard the cause on November 18 and 19, 1963, at which hearing it rejected as irrelevant appellants' offers to prove that: (a) the apportionment formula was specifically designed and intended to curtail the representation of residents of the more heavily populated areas of the state; and (b) that the malapportioned legislature in fact discriminated against such residents in levying taxes, allocating revenues, public utility regulation and exercise of police powers. Under these exclusionary rulings of the court, appellants were permitted only to introduce, and did introduce, evidence of the existing apportionment and the apportionment which must necessarily result when the mandatory formula contained in the state constitution and laws is applied to the 1960 citizen census figures. The appellee county commissioners joined with appellants in asking the court for relief. No appellee called any witnesses, nor offered any evidence to justify or rationalize the gross disparities which exist in both senate and house between population and representation; some facts were stipulated or admitted.

On appeal from the decision of January 10, 1964, this court entered its reversal and remand on June 22, 1964, U.S. . On July 2, 1964, defendant

Robert E. Smylie, Governor of the State of Idaho, filed his motion below requesting determination of the case on the merits in order that the provisions of the Idaho Constitution and statutes preventing compliance with *Reynolds v. Sims, supra*, and other cases, might be judicially determined and the legislature empowered to validly reapportion. On July 14, 1964, plaintiffs moved, among other things, for a decision on the merits and for an injunction of the imminent special session of the legislature and any regular legislative session for any other purpose except reapportionment. All motions were heard by the court below on July 24, 1964, and on said day plaintiffs also filed their motion requesting immediate decision on the earlier Motion for Temporary Restraining Order and Injunction. The court on July 28, 1964, entered the order appealed from herein.

C) The Opinion Below

Confronted with the remand of this Court directing further proceedings on the merits and with the motions of appellants and the appellee Governor for an immediate decision on the merits, the court below heard argument on these matters July 24, 1964. No party filed motions requesting any delay or stay of proceedings, and no evidence was presented to that end.

On this record, the three-judge district court, *sua sponte*, entered its stay order reciting facts and conclusions not contended for by any party or based on any evidence before the court.

This terse order, set forth in Appendix A to the Jurisdictional Statement, relegates plaintiffs to the position from which they originally appealed to this court. That appeal was based on the refusal of the lower court to decide the case on the merits. Jurisdictional Statement, *Hearne et al v. Smylie et al*, October Term, 1963, No. 1075.

Under the terms of the stay order appealed from herein, the lower court, by indefinite postponement of all proceedings in the case, has reinstated its former decision and persists in its refusal to comply with the remand of this court.

In this context, it should be noted that the order appealed from does not order reapportionment, in fact prevents it, and leaves to the malapportioned legislature complete control of when further proceedings may be had in this case.

## SUMMARY OF ARGUMENT

### I

A. Pursuant to the Order of this Court entered February 1, 1965, U.S. , 13 L. Ed. 2d 698, retaining this cause on the docket until the Court Conference of May 21, 1965, appellants hereby report progress made in reapportioning the Idaho legislature. Below are set forth the amendments to the statutes on apportionment made by the recent Legislature and the authorities Plaintiffs believe establish that the formula

contained in the State Constitution and such amended statutes results, and must necessarily result, in gross disproportion between population and representation in both houses of the Idaho legislature.

B. The First Extraordinary Session of the 38th Legislature of the State of Idaho convened March 19, 1965, and adjourned March 25, 1965. The Appellee Governor Smylie called such special session to reapportion both houses of the Idaho legislature, said Appellee and the legislative leaders having agreed that reapportionment would not be taken up at the regular session of said 38th Legislature which convened January 4, 1965. Three statutes were enacted by said extraordinary session, one establishing senatorial districts, one establishing representative districts, and a third amending the laws for nomination of Senators and Represenatives.

The bills became law upon signature on April 2, 1965 by the Appelle Governor. No amendments to the Constitution of Idaho were proposed to the people. The formula for representation in both houses of the legislature as amended, produces and must necessarily produce an arbitrary disparity between population and representation. The invidious discrimination against the more populous areas, based on the new senate districts is identical to that previously existing, forty-four senators now being elected from nine senatorial districts on the basis of one per county, whereas before such amendment each senator was elected sepa-

rately from each of the Counties of the State. One Senator represents at the greatest 93,460 persons, and one senator represents at the least 915 persons. Under the 1960 census, 17% of the population still effectively elects a majority of the Senate.

The House of Representatives districting still results in an invidious discrimination because of the disparities between representation and population. The House was reapportoned by the creation of 27 representative districts, from which are elected 67 representatives, as compared to the 79 representatives previously elected from the separate 44 county districts. Prior to the recent amendment, a representative, at the greatest, represented 15.7 times as many citizens as the representative of the least number of people. Under the amendment, the ratio has been reduced to the representative of the greatest number of people as representing 1.49 to 1 for the representative of the least number of persons. The largest number of persons represented by one representative is 12,363, the least 8,287 persons.

There is no rational basis for the manifest disparities among legislators elected from the nine senatorial districts, or the 27 representative districts. The senate districts vary between the largest two districts consisting of eight counties each, and the smallest two districts consisting of two counties each, with an extreme population variance in the districts between 127,497 persons in the fourth district, and 26,912 in the eighth

district. In addition to this wide variance, the nine districts do not represent compact areas, but wander across large portions of the State without reason, disregarding community interests and transportation routes. Likewise, the 27 House Districts vary from a one county district of 93,460 persons as the largest district, to the smallest consisting of three counties containing 8,287 persons. There is no rational basis for the particular counties which are districted together. In both the Senate and the House districts could have been created which would have resulted in very little disparity in population and in the number of persons represented by each representative and senator. Further, in judging the disparity in representation and invidious discrimination resulting therefrom in each of the houses, the representation of the two houses must be viewed together. In light of the 100 to 1 disparity of the number of persons represented by the senator from the largest and smallest county, and in light of the case whereby the 44 counties could have been equally grouped if so desired, there is no rational basis which can justify such variations in the districting created by the Legislature.

Finally, the proceedings here clearly call for directions to be issued by this Court to the court below. This is necessitated by the history herein of legislative intransigence in reapportionment and of the indisposition of the three judge statutory court to grant a declaratory judgment, in addition to the refusal to fashion any equitable relief.

# ARGUMENT

## I

## HISTORY OF INABILITY TO OBTAIN RELIEF FROM MALAPPORTIONED LEGISLATURE IN IDAHO

Despite the admonition of this Court that any delay in giving relief is a significant departure from the ". . . usual principle that any deprivation of constitutional rights calls for a prompt rectification," *Watson v. Memphis*, 373 U.S. 534, 10 L. Ed. 2d 529, this case presents a classic example of a legislature and a three-judge statutory court with an apparent inability to provide any relief from the invidious discrimination of the malapportioned Idaho Legislature. Since the commencement of this action in October, 1962, the Plaintiffs have witnessed one general election and four sessions of the Idaho Legislature and are presently involved in the second appeal to this Court, without any relief having been obtained. In addition, during this period the Idaho legislature, as hereinafter set forth, has in each session clearly indicated its unwillingness to face reapportionment of its membership.

The Idaho Legislature has also had ample notice of the invidious discrimination against the Plaintiffs and those similarly situated. The apportionment of the House of Representatives was attacked in an action in the State Court commenced in the summer of 1961, and subsequently decided on April 3, 1962. *Caesar vs.*

*Williams*, 371 P. 2d 241, 84 Ida. 254. Said decision occurred after the decision of March 26, 1962 of *Baker v. Carr*, 369 U.S. 186, 7 L. Ed. 2d 663. The Idaho Supreme Court held that the Constitution and Statutes of Idaho destroyed any possibility of per capita or per voter representation in the House, but refused any relief under the Fourteenth Amendment of the U. S. Constitution. In the Fall of 1962 the present action was commenced and the proof below shows that information concerning said action was given to each member of the 37th Session of the Idaho Legislature which met between January 7 and March 19, 1963. As occurred thereafter in each session, the Senate of said 37th Session originated and the House passed Senate Joint Memorial No. 4 to the Congress of the United States memorializing it to amend the Constitution in order that each state might apportion its representation in the Legislature by any manner it saw fit and prevent the judiciary of the United States from interfering therewith.[1]

The same regular session passed an amendment to

---

[1] Thirty-seventh Regular Session, Senate Joint Memorial No. 4:

"Section 1—No provision of this Constitution or any amendment thereto shall restrict or limit any state in the apportionment of representation of its legislature.

"Section 2—The judiciary power of the United States shall not extend to any suit in law or equity, or to any controversy relating to apportionment of representation of State Legislatures." Passed February, 1963."

This joint memorial, as well as other joint memorials and resolutions hereinafter cited are set forth to show that the legislature had notice in regard to the requirement of reapportionment, and for the purpose of showing its avoidance of those requirements. It is not the intention by citation of these memorials to intimate that the legislature did not have the privilege of requesting constitutional amendments.

Section 67-203, Idaho Code (Chapter 15, Session Laws of 1963, page 149), amending the formula of apportionment for the House of Representatives. This amendment is noted in the Supplemental Complaint filed herein, and did slightly improve the representation in the House.

The Legislature could not help but note the trial in this case before the three-judge statutory court November 18-19, 1963, the decision rendered therein on January 10, 1964, and the reversal and remand of that decision on June 22, 1964. Considerable publicity attended the latter event and the hearings held immediately thereafter on July 24, 1964, of the motions of the Appellee Governor and Appellants for an immediate decision on declaratory relief. Two days prior to such hearing, on July 22, 1964, the Appellee-Governor issued a call for the first extraordinary session of the 37th Legislature to meet July 29, 1964, including five items of business, one of which proposed amendments to the Idaho Constitution on water rights to be set before the voters in the coming November, and paragraph No. 3 of which requested money and authority for the Legislative Council to make studies for preparation of legislation to reapportion the Legislature.[1] of the Appellee Governor were purposefully to continue

[1] Proclamation, July 22, 1964, by Governor Robert E. Smylie, which in paragraph 3 stated:

"To consider the passage of, and to enact, legislation appropriating funds to the Legislative Council for the purpose of completing studies required in the preparation of legislation reapportioning the membership of the House of Representatives and the Senate of Idaho."

This extraordinary session passed House Bill No. 4 appropriating $20,000 for such reapportionment studies and, while not within the call of the Session, also passed Senate Joint Memorial No. 1, memorializing Congress to support Senator Dirkson's Senate Joint Resolution No. 184, to preserve to the Legislatures of the States their historical right to apportion themselves.[1] It should be recalled that this special session and such memorial occurred after the decision of *Reynolds v. Sim*, supra, in June, 1964. It should also be noted that the 37th Extraordinary Session Legislature was elected under the 1951 reapportionment formulas in the House, and both its actions and that

---

[1] Senate Joint Memorial No. 1, First Extraordinary Session Thirty-seventh Legislature

WHEREAS, we heartily concur with the remarks of the distinguished Senator from Illinois, the Honorable Everett M. Dirksen as said remarks are recorded in the Congressional Record of the United States Senate on page 16127, and

WHEREAS, we are in complete accord and heartily endorse and urge the passage of Senate Joint Resolution No. 184, which Resolution was introduced on July 23, 1964 by Mr. Dirksen for himself and twenty other United States Senators, and

WHEREAS, this Resolution follows closely the intent and wording contained in Idaho State Joint Memorial No. 4, passed by the regular session of the Thirty-seventh Legislature of the State of Idaho on February 4, 1963, which Memorial was forwarded to th Congress of the United States on February 9, 1963.

NOW, THEREFORE, BE IT RESOLVED by the First Extraordinary Session of the Thirty-seventh Legislature of the State of Idaho now in session, the Senate and House of Represenatives concurring, that the Congress and President of the United States of America, be respectfully petitioned to give priority to Senate Joint Resolution No. 184 in order that the entire historic legislative processes of the fifty states be preserved and the right to apportion State Legislatures as their individual states may determine shall be held inviolate, and

BE IT FURTHER RESOLVED, That the Secretary of State of the State of Idaho be, and he hereby is, authorized and directed to forward certified copies of this Memorial to the President and Vice President of the United States, the Speaker of the House of Representatives of the Congress, and to the Senators and Representatives representing this State in the Congress of the United States."
Senate Journal second legislative day, July 30, 1964.

such malapportionment in defiance of the law then announced in *Reynolds v. Sim, supra.*

The second regular session of the Idaho Legislature since the filing of this action convened in 1965, being in session between January 4 and March 18, 1965. By prior arrangement between the Appellee Governor and the legislative leaders, it was decided that reapportionment would not be taken up at this regular session of the Legislature, but would be delayed until an extraordinary session to follow immediately. Nevertheless, despite this agreement, defiance by the Idaho Senate of the requirements of reapportionment was evidenced by Senate Joint Resolution No. 1, again requesting Congress to call a Convention to amend the Constitution to allow one house of a bicameral legislature to be apportioned on factors other than population. No other act concerning the election of the legislature of Idaho was passed at the 38th regular session, but upon its adjourning *sine die* on March 18, the Governor issued his call for the first extraordinary ses-

---

[1] Senate Joint Resolution No. 1: "Resolved by the Senate of Idaho and concurred in by the House of Representatives of Idaho, requested a convention for proposing the following article of amendment to the Constitution:

"Section 1. Nothing in this Constitution shall Prohibit any State which has a bicameral legislature from apportioning the members of one house of such legislature on factors other than population, provided the plan of such apportionment shall have been submitted to and approved by the vote of the electorate of the State.

Section 2.—Nothing in this Constitution shall restrict or limit a state in its determination of how membership of governing bodies of its subordinate units shall be apportioned.

Section 3.—This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of ¾ of the several states within 7 years from the date of its submission to the states by Congress."

Idaho Senate Journal, 2nd Legislative Day, Jan. 5, 1965, page 9.

sion of the 38th Legislature, including reapportionment of the Legislature, redistricting of Congressional Districts and other matters not here involved.[5] Upon the meeting of the Legislature, the Governor submitted a message which, in its pertinent sections, both reviewed the Stay Order of the three-judge statutory court, and stated:

"That Court itself is under compulsion to compel action. The Supreme Court of the United States has stayed review of the order of the local court under which you have just concluded meeting until May 21 of this year, at which time presumably they will reentertain the appeal made by counsel for plaintiffs in the apportionment action from the interlocutory order of the local court."

"I do feel constrained to point out however that failure to achieve a solution to these two problems in this extraordinary session will very likely have the effect of making it impossible ever again to consider the problem in a legislative session free from the compulsion of a judicial decree."

". . . We are thus required to construct a system of apportioning both Houses of this legislature primarily on the basis of population density.

[5] The call of the Governor for the session to commence March 19, 1965, included under point 2 thereof:

"To consider the passage of, and to enact legislation reapportioning the membership of the Idaho State Senate and the membership of the Idaho State House of Representatives, among several counties in conformance with the Constitution of the United States."

House Journal, Idaho Legislature, 1st Extraordinary session, 38th Session, March 19, 1965, pp. 4, 5.

Solution will not be easy. But a solution must be found. I will make no affirmative recommendation to you because this is a task which we must share together, and which is most intimately and particularly your task because it is your constituencies and your offices which have been drawn in question."

Despite these admonitions by the Appellee-Governor, as will appear below, the 38th Session failed to reapportion the Legislature to eliminate invidious discrimination by disparity of representaton in either House. Thus, after four separate legislative sessions, occurring after the commencement of this action, of which two regular sessions and one special session have occurred since the decision of *Reynolds v. Sims, supra*, no change has been made to equalize representation in the Idaho Senate and the improvements in the Idaho House have not been sufficient to eliminate the disproportionate representation between voters in different parts of the State. At the same time, three separate memorials have been sent to Congress in three of the four sessions, praying for Constitutional Conventions which would eliminate any judicial review in the Federal courts of apportionment. Finally, the last three sessions of such legislatures during a period of eight months have been held under the umbrella of the Stay Order from which this Appeal has been taken.

The grounds for the Stay Order as stated therein was the imminence of the August primary and November general election. This may be a valid ground to

delay granting equitable relief, but does not support failure to grant a declaratory judgment as prayed for. This failure of the three-judge statutory court to grant declaratory relief, determining the unconstitutionality of the constitutional and statutory provisions of Idaho relating to apportionment, has further aided said legislatures to avoid reapportioning themselves. In essence, the above facts demonstrate the intransigent attitude of the legislature, and the indisposition of the three-judge statutory court toward relieving the invidious discrimination against the Plaintiffs and those similarly situated in the more populous counties in their representation in the Idaho Legislature.

## II

## IDAHO LEGISLATURE HAS FAILED TO REAPPORTION ITSELF

Upon more than adequate notice, and with at least three sessions last past available during which action could have been taken, the Idaho Legislature has failed to reapportion itself in accordance with the requirements of the Fourteenth Amendment to the United States Constitution. Contrary to the statements in the second Motion to Dismiss filed March 1965 herein by the Appellees represented by the Attorney General of the State of Idaho, among the questions presented to the Court on this appeal is the validity of the constitutional and statutory provisions of Idaho setting forth the apportionment of the Legislature. The first two

questions presented as set forth in the Jurisdictional Statement raised the same questions as on the first appeal—Plaintiff's inability to obtain a declaratory judgment as to the constitutionality of the Statutes and the Constitution of Idaho. Similarly, questions presented, Nos. 4-7 raise related questions of the failure of the three-judge statutory court by such declaratory judgment to provide guidelines by which the Legislature can act, and the failure of said court to obey the remand and reversal of this Court.

These issues being before the Court, any changes in the statutory and constitutional provisions of Idaho relative to these matters have been requested to be reported to this Court. The same is made herewith.

No change was made or proposed to any of the constitutional provisions of the State of Idaho material hereto. The identical provisions involved in the first appeal are still in force and effect.

A. Senate Plan

The Senate plan of apportionment in Idaho has not been changed, although the law relating thereto has been amended. Among the 70 plans presented to the Legislature by the Legislative Council study were 30 plans creating substantial equality of representation of voters in the different areas of the State. Some of these plans were districting of counties without any county being in more than one district, and some of them were integral districts, with counties being in more than

one district where necessary to balance population representation. The Senate did not adopt any of these plans. On the contrary, in a manner calculated to delay and frustrate any correction of the invidious discrimination against Plaintiffs, and to stall for time in hope of an amendment to the United States Constitution preventing reapportionment of the Idaho Senate, it originated and passed Senate Bill Nos. 10 and 11, signed into law on April 2, 1965, by the Appellee Governor. These two statutes divide the 44 counties of the State into nine senatorial districts and purport to create election of Senators at large within such districts. However, they require the nomination of the candidate for each political party to be made solely by the electors of the County wherein he has resided and been an elector for one year prior to the nominating election. Only after the nomination of one candidate for each political party from each county is a district-wide election then held. Even then, a new ballot is created whereby the Senate candidate from each county is listed with the other political Senate candidates from that county, separate from the political candidates from each other county within the Senate district. While all electors in the district then vote for Senators to be elected from the district, the populous counties' electors must select one Senator from their county, and one Senator from each of the other counties previously nominated by such other counties. For example, Ada County, together with seven other counties forms the fourth senatorial district, and of the 127,000 persons

in such district, 93,460 are in Ada County. Thus, while 73% of the population of the fourth senatorial district is located in one county, the electors of that county may only nominate one Republican and one Democrat to run for the Senate from such district. The other seven counties nominate the candidates who will run for the other seven seats. While the electors of Ada County then vote for the Republican or Democratic Senate nominee from each of the other counties, their choice is limited strictly to that of a party selection, not to a representative from their county or at large.

This plan carefully selects each senate district to encompass one heavily populated county and a number of sparsely populated counties, thereby allegedly allowing the more populous county voters to select all of the Senators within such district, while in effect continuing the representation of each of the 44 counties in Idaho by a Senator chosen by said county. A division of the population of Idaho of 667,191 by the 44 counties results in an average of approximately 15,000 persons per Senator. Yet the result of the bill is that the 93,460 persons in Ada County are still only represented by one Senator, while the 915 persons in Clark and Camas Counties are still effectively electing one Senator each. This results from Senate Bill No. 11, amending Section 67-202, Idaho Code, to provide that in the general election each voter in a senatorial district casts one vote for a candidate from each county. By the provisions of Senate Bill No. 10, amending Sec-

tion 34-605, I.C., it is provided that a candidate to be nominated from a county must be a resident and elector of that county for one year prior to the time he runs for nomination. Further amendments by the latter bill to Sections 34-636 and 34-637, Idaho Code, affirm that a State Senator can only be nominated by political subdivisions, not by senatorial districts. The new ballot form is added by a new section, Section 34-904A.

Senate Bill No. 11 is equally defective for its failure to provide approximately equal districts and to provide compact districts. The senatorial districts range from two districts containing eight counties each down to two districts containing two counties. The Fourth District contains 127,497 persons while the Eighth District contains only 26,912 persons. Four of the districts are compiled without regard to community of interest and transportation routes. Thus, District Four encompasses in its central and northerly half, one of the large forested primitive areas of the State, across which there are no roads. Even in the southerly portion of the Fourth District, such roads that exist are minor dirt forestry roads, blocked approximately half of the year. This division of community interest is shown completely by the Congressional Redistricting Act adopted by the same session, wherein the two Congressional districts are divided on the north-south center line of Senate District No. 4. H.B. No. 6, First Extraordinary Session, 38th Legislature. As a result,

there has been no change in the Senate apportionment. The range of representation is still from one Senator from Ada County for 93,460 people to one Senator from each of Camas and Clark Counties for 915 people, or a ratio of approximately 100 to 1. This scheme is invidiously discriminatory against the Plaintiffs and those similarly situated.

B. House Plan

The House of Representatives reapportioned itself by H.B. No. 3, signed into law by the Governor on April 2nd, 1965. Thereby were created 27 representative districts electing 67 Representatives, as compared to the present House of 44 county electoral districts electing 79 Representatives. The Legislative Council likewise presented to the House in the 70 plans, 40 plans which were applicable to the House of Representatives, containing both districts by single counties, and integral districts with some counties in more than one district to balance out population. The House of Representatives did not adopt any of these plans. Based on the Idaho population in 1960 of 667,191 persons, 67 Representatives would on the average represent 9,958 people per Representative. Nevertheless, the plan adopted by the House has at one extreme 12,363 persons and at the other 8,287 persons, represented by one representative each. This is a ratio of 1.49:1, which on its face is an invidious discrimination against Plaintiffs and those similarly situated located in more populous counties. Thus, the four sparsely populated counties of Caribou,

Bear Lake and Franklin and Oneida have three representatives for 25,184 persons, or one for each 8,394 persons. Likewise the three very sparsely populated forested counties of Adams, Boise and Valley, with 8,287 persons have one representative. At the other extreme the heavily populated county of Twin Falls with 41,842 persons has four representatives for an average representativeness of 10,460 persons. Ada County with 93,460 persons is entitled to nine Representatives, for an average of 10,384 persons per representative. Canyon County has six representatives for its 57,662 persons, or an average of 9,610 per representative. Interestingly enough, if two additional Representatives had been given to Ada County, and one additional Representative had been given to Canyon County, the average representative in Ada County would have represented 8,490 persons and in Canyon County 8,230 persons, almost identical to the minimum range as established.

If only one more is added to Ada County, the average per representative is 9,346, compared to the state average of 9,958. The same is true of the large county of Bannock, where five representatives for the 49,349 persons average a representative for each 9,869 persons. The addition of one representative here would have brought this average down to 8,220 persons per representative, again at the minimum range. The same is true of the large county of Twin Falls with its 41,482 persons. Therefore, by using an arbitrary system of

county districts instead of a population formula substantial deviation from proper representation has been deliberately achieved. A number of the plans presented would have obtained substantial equality of representation among the electoral districts in the average number of persons represented by each representative. For example, Payette County, which has been set up as a single district with one representative for its 12,363 people, could have been correctly districted with two or more of its adjoining counties to obtain a reasonable ratio of representation. That the House had no difficulty in putting counties together to create districts can be observed by the fact that of the 27 districts, 15 contain one county each at one extreme, while three districts contain three counties each and one district contains four counties. While the House plan has reduced the variance between the ratio of representation of the House under the 1963 apportionment formula from 15.7:1 to 1.49:1, no rational basis can be shown to justify even this deviation in the most populous House.

## III

## IDAHO LEGISLATIVE APPORTIONMENT INVIDIOUSLY DISCRIMINATES AGAINST APPELLANTS AND IS THE RESULT OF THE CONSTITUTION AND STATUTES OF IDAHO

Appellants are denied due process and equal protection of the law as guaranteed by the Fourteenth Amendment of the Constitution of the United States, by virtue of the provisions of the Idaho Constitution

and the statutes in implementation thereof, which provide apportionment of the Legislature in a manner which discriminates against the residents of the more populous area of the state without any rational basis.

The overall apportionment plan, consisting of the constitutional provisions of the State of Idaho and the three statutory amendments enacted by the First Extraordinary Session of the 38th Legislature results, and by necessity must result, in gross inequalities and disparities with respect to voting rights. The three bills must be considered as a single plan, enacted at one time in a few days with each House originating its own plan and consented in by the other House and inseverably joined together with interlocking provisions of the statutes. This Court has held that:

> ". . . In reviewing a State legislative apportionment case this Court must of necessity consider the challenged scheme as a whole in determining whether the particular state's apportionment plan, in its entirety, meets Federal Constitutional requisites . . . The proper, and indeed indispensable subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the state's voters in both houses of a bicameral state legislature." *Maryland Committee on Fair Apportionment vs. Tawes,* U.S. , 12 L. Ed. 2d 595 at 606.

Thus, where one House at least arguably may be sub-

stantially apportioned according to population, its inseverability with a malapportioned second House will cause the entire reapportionment plan to fall. *Lucas v. Colorado General Assembly*, ___ U.S. ___, 12 L. Ed. 2d 632, at 646, Footnote 27. As was true in the Colorado case, the populous counties which are somewhat under-represented in the House are grossly, and exaggeratedly, under-represented in the Senate, creating a plan which is not severable and must fall in its totality.

A single plan was devised. The special session being called primarily for legislative reapportionment, it was considered as a whole by the Idaho Legislature. The principle in the case of *Lucas v. General Assembly of Colorado*, supra, of an electorate voting on an apportionment plan including the formula for both houses, is equally applicable here to a single legislative session in a few days establishing a plan for both houses. In addition, Senate Bill No. 10, amending the nomination law contains no separability clause sustaining the balance of its provisions if any one thereof is declared unconstitutional. This bill creates for the first time the election of both senators and representatives from districts, as opposed from individual counties. As there is no possibility of sustaining the apportionment of the Senate, as is more fully set forth hereinafter, this bill must be declared unconstitutional in its entirety. This would result in the House Reapportionment plan under H.B. No. 3, based on representa-

tive districts, having no means to nominate by representative districts for election to the House. The legislative intent is thus made clear that this is a single reapportionment plan consisting of H.B. No. 3, Senate Bill No. 11 and S.B. No. 10.

Any evaluation of the Idaho apportionment plan in its totality establishes that there is insufficient compliance with the requisites of the Equal Protection Clause of the Fourteenth Amendment, as gross disparities in voting rights by districts exist and cannot be justified on any rational basis. *Reynolds v. Sims,* U.S. , 12 L. Ed. 2d 506; *Maryland Committee for Fair Representation v. Tawes,* U.S. , 12 L. Ed. 595, *Lucas vs. Colorado General Assembly,* U.S. , 12 L. Ed. 632; *Moss v. Burkhart,* 20 Fed. Supp. 149, Affd. U.S. , 12 L. Ed. 1026; *Fortson v. Dorsey,* U.S. , 13 L. Ed. 2d 401; *WMCA vs. Lomenzo,* U.S. , 12 L. Ed. 2d 569; and *Gray v. Saunders,* 372 U.S. 368, 9 L. Ed. 2d 821, 83 S.Ct. 801. Senate Bill No. 11 amends Section 67-202, Idaho Code to provide that Senators shall be elected in compliance with the Fourteenth Amendment and ". . . with Article 3, Section 2 of the Constitution of the State of Idaho . . ." This latter section requires the election of one Senator from each county. The same bill confirms this conclusion on page 2 thereof in which it requires that:

> "There shall be nominated from each of the 44 county political subdivisions, one senatorial candidate for each political party . . . Each qualified voter

in a senatorial district shall be entitled to cast one vote for a candidate for a senator from each county political subdivision within such senatorial district. A majority of ballots cast at the general election by the entire senatorial district as between candidates of each respective county political subdivision shall elect one senator from each such political subdivision."

This maintains the exact *status quo* in Idaho, where 44 Senators are elected at present, one from each of the 44 counties. Senate Bill 11 only adds one factor to the previous law, by providing that the entire electorate of a senatorial district can pick between the Democratic and Republican candidate from each of the counties of the District.* All nominations are by county, and each Senator is to represent his county. This maintains the disparity of 100:1 in the ratio of representation in the Idaho Senate, by which 17% of the people elect a majority of the Senators. Further, the nine senatorial electorate districts do not meet the requirement of law of precise equality among electors in district-wide elections, *Gray v. Saunders, supra.* The Senate reapportionment falls within the ruling of *WMCA v. Lomenzo, supra,* as a devious evasion of the requirements of equality. It results in a plan by which the:

". . . weight of votes of those living in the populous

* While this issue is not raised by the pleadings, the imposition of the political tendencies of the more populous counties on the smaller counties, without reasonable districting is probably invidiously discriminatory.

areas is of necessity substantially diluted in effect. However complicated or sophisticated an apportionment scheme might be, it cannot, consistent with the Equal Protection Clause, result in a significant under-valuation of the weight of the votes of certain of the state's citizens merely because of where they happen to reside." *WMCA vs. Lomenzo, supra.*

As set forth above, the nine Senate districts are based on no rationality of community of interest or transportation routes, showing further that they are purely for a purpose of evasion. There is no rational basis for the manifest disparity in the total population between the largest and smallest senatorial district, a difference of five to one, for as the various plans of the Legislative Council show, the 44 counties may be divided up fairly equally. For example, the Fourth Senatorial District is divided into an easterly and westerly area separated by high mountainous terrain, uncrossed by any state highway or improved roads. Likewise, the Fifth District stretches along the Oregon border for 160 miles north from the Nevada boarder, without community of interest or compactness.

The disparity of representation in the House of Representatives occurs primarily in the most populous counties, which are the same counties least represented in the Senate plan. These are primarily the counties of Ada, Bannock, Bonneville, Canyon, Nez Perce and Twin Falls. Instead of the disproportionate representation in the House plan being balanced by greater equal-

ities as to these same areas in the Senate Plan, they are exaggerated. The entire plan is therefore in its totality an invidious discrimination against the voting rights of Plaintiffs and those similarly situated. *Lucas v. Colorado General Assembly, supra.*

## IV

## DIRECTIONS TO COURT BELOW TO GRANT RELIEF TO PLAINTIFFS SHOULD BE ORDERED

The history of this case through two regular sessions and two extraordinary sessions of the Idaho Legislature and through two appeals to this Court, with no effective relief as yet forthcoming for the Plaintiffs, demonstrates the need for this Court to remand the matter with directions to the lower court as to the judgments to be entered. As was well stated in *Moss v. Burkhart, supra,*

> "... we are convinced, from all that has transpired in this prolonged proceedings, that the legislature as now constituted, is either unable or unwilling to reapportion itself in accordance with our concept of the requirements of the Equal Protection Clause of the Fourteenth Amendment. We assume this responsibility, fully aware of its gravity and perplexity. We know, of course, that the function of apportioning the state legislature is essentially legislative in nature; one which the courts have never before undertaken; and one from which we may well be precluded even in the face of inadequate redress

> for the deprivation of civil rights. . . . We shall proceed on the fundamental premise that equity is never impotent or indolent before the law." 220 F. Supp. at 155.

As affirmed by this Court, these principles are applicable here. The Idaho Senate has elected one Senator from each county of the 44 under the Constitution and statutes for over thirty years. Each election has seen the disparity of representation increased as the rural areas have decreased in population and the more populous areas have increased. This has continued since the commencement of reapportionment actions in Idaho in 1961. The House of Representatives, while its ratio of representation has improved under the 1960 census from the 1951 reapportionment formula of 17.7:1 to 1.49:1, still has a variance from substantial equality which cannot be justified by any reason. Inasmuch as the apportionment plan adopted by the First Extraordinary Session of the 38th Legislature in March of 1965 is a single, non-severable plan, the invidious discrimination long continued has changed little.

In view of the original decision of the three-judge statutory court, dismissing the complaints of plaintiffs herein, and the present Stay Order issued upon the reversal and remand by this Court, the reluctance of the three-judge statutory court to exercise its discretion in declaring the constitutionality of apportionment in Idaho and to fashion effective, equitable relief, is clear.

This case is no further advanced judicially than when the lower court issued its original opinion on January 10, 1963. The court below having already declared that it has a ". . . lack of both omnicompetence and prescience, which it appears to us would be necessary, to make a judicial appraisal and declaration that the State's old time method of apportionment is irrational . . .", it is submitted that appropriate directions will be necessary for the rights of the Plaintiffs to be sustained and protected in this matter.

## CONCLUSION

This Supplemental Brief is submitted in accordance with the decision of this Court, and Plaintiffs pray that for the reasons given above, the Stay Order of the court below should be reversed and the case summarily remanded to the District Court with directions to grant the relief sought in the Complaint.

Respectfully submitted,

McDEVITT AND McDEVITT

By:
A Member of the Firm
Attorneys for Plaintiffs
First Security Bank Building
Pocatello, Idaho

## APPENDIX AA

## STATE STATUTES: FIRST EXTRAORDINARY SESSION, 38TH LEGISLATURE: HOUSE BILL No. 3

SECTION 1. That Section 67-203, Idaho Code, be, and the same hereby is repealed.

SECTION 2. That Chapter 20 of Title 67, Idaho Code, be, and the same is hereby amended by adding a new section thereto, following Section 67-202, Idaho Code, to be known and designated as Section 67-203, and to read as follows:

*67-203. Members of the House of Representatives shall be elected from twenty-seven (27) representative districts consisting of the following counties and number of representatives from each district:*

| *DISTRICT No.* | *COUNTIES* | *MEMBERS* |
|---|---|---|
| *1* | *Boundary—Bonner* | *2* |
| *2* | *Kootenai* | *3* |
| *3* | *Shoshone* | *2* |
| *4* | *Latah—Benewah* | *3* |
| *5* | *Clearwater* | *1* |
| *6* | *Nez Perce* | *3* |
| *7* | *Idaho—Lewis* | *2* |
| *8* | *Adams—Valley—Boise* | *1* |
| *9* | *Washington* | *1* |
| *10* | *Payette* | *1* |
| *11* | *Gem* | *1* |
| *12* | *Canyon* | *6* |
| *13* | *Ada* | *9* |

| | | |
|---|---|---|
| *14* | *Elmore—Owyhee* | *2* |
| *15* | *Lemhi—Custer—Butte* | *1* |
| *16* | *Blaine—Camas—Lincoln* | *1* |
| *17* | *Gooding* | *1* |
| *18* | *Jerome* | *1* |
| *19* | *Twin Falls* | *4* |
| *20* | *Cassia—Minidoka* | *3* |
| *21* | *Clark—Fremont* | *1* |
| *22* | *Jefferson* | *1* |
| *23* | *Madison—Teton* | *1* |
| *24* | *Bonneville* | *5* |
| *25* | *Bingham—Power* | *3* |
| *26* | *Bannock* | *5* |
| *27* | *Caribou — Bear Lake—Franklin—Oneida* | *3* |

## SENATE BILL No. 10

SECTION 1. That Section 34-605, Idaho Code, be, and the same is hereby amended to read as follows:

34-605. PERSONS QUALIFIED TO BECOME CANDIDATES.—Any person legally qualified to hold such office is entitled to become a candidate for office, and to have his name placed on the ballot provided for any nominating election authorized herein, upon a substantial compliance with the terms of this act, and not otherwise.

*No person shall be a candidate for state senator who, at the time of his filing as a candidate, is not a citizen of the United States, and an elector of this state nor*

*anyone who has not been, for one year next preceding the nominating election, a resident and elector of the county within which he files for nomination.*

*No person shall be a candidate for state representative who, at the time he files for nomination, is not a citizen of the United States, and an elector of this state and who has not been, for one year next preceding the date of nominating election, a resident and elector within the representative district whence he may be chosen.*

SECTION 2. That Section 34-606, Idaho Code, be, and the same is hereby amended to read as follows:

34-606. DECLARATION OF CANDIDACY — TIME OF FILING—FORM.—Each candidate for office shall file his declaration of candidacy in the proper office, as herein provided, by May 7th but not before May 1st, prior to the nominating election to be held to nominate candidates for such office, in substantially the following form, to-wit:

Candidates for *state senator, state representative,* county or precinct office shall file a declaration of candidacy in the following form, to-wit:

I, the undersigned, being a qualified elector of ..... Precinct, ..... County, State of Idaho, and a member of ..... party, hereby declare myself to be a candidate for the office of ....., to be voted for at the nominating election to be held on the ..... day of ....., 19 ..., and certify

that I possess the legal qualifications to fill said office, and represent the principles of said party, and that my post office address is .....

(Signed) .....

Each candidate for the office of United States senator and United States representative, governor or any state office shall file his declaration of candidacy in the following form, to-wit:

I, the undersigned, being a qualified elector of ..... Precinct, of ..... County, State of Idaho, and a member of ..... party, hereby declare myself to be a candidate for the office of ....., to be voted for at the nominating election to be held on the ..... day of ....., 19..., considered for endorsement by the state assembly of the ..... party, at a meeting of said assembly to be held on the ..... day of ....., 19..., and certify that I possess the legal qualifications to fill said office, and represent the principles of said party, and that my post office address is .....

(Signed) .....

Subscribed and sworn to before me this ..... day of ....., 19....

.....

Notary Public

All blank spaces shall be properly filled in with the necessary information, and the declaration of candidacy shall be subscribed and sworn to before an officer authorized to administer oaths.

Said declaration of candidacy, before the same shall be filed in the office of the secretary of state, or in the office of the county auditor, as the case may be, must have appended thereto a petition or petitions in substantially the following forms, to-wit:

The declaration of candidacy shall have appended thereto a petition or petitions in the following form, to-wit:

I, the undersigned, being a qualified elector of the State of Idaho, and a member of the ..... party, do hereby certify and declare that I am a member of the said party and that ....., a candidate for the office of ....., to be voted for at the nominating election or state assembly to be held in 19 ..., is legally qualified to fill said office and represents the principles of said party.

I further certify and declare that I intend to support said office and have signed no other petition for a candidate for the same office.

Name of Petitioner  Post-office  Date of Signing

.....

Each candidate for United States senator, United States representative, governor, or any state office must

have appended to his declaration of candidacy a certificate in the following form, to-wit:

State of Idaho, )
) ss:
County of )

I do solemnly swear (or affirm) that I am a qualified elector of the State of Idaho and a legal resident of the county of , and that I am a member of the party; that each of the persons whose name is affixed to the above paper signed the same personally, together with his post office address and the date of signing, and that he signed the same with full knowledge of its contents; that to the best of my knowledge he is a qualified elector of the State of Idaho and is a member of the party, that I intend to support the candidate named in such petition at the state assembly of the party, and in good faith to support the candidates, generally, at the next general election of the party, of which the candidate named in the petition is a member.

Subscribed and sworn to before me this day of , 19 .

Notary Public

Said petition shall be signed by qualified electors residing within the political division in and for which the officer is to be elected to the number of at least 1,000, nor more than 50 of which may reside in any

one (1) county when the nomination is for an office to be filled by the voters of the entire state; or at least 500, nor more than 50 in each county where the nomination is for an office to be filled by the voters of less than the entire state, except in the case of a district judge where the names must be divided approximately equally among the counties of the district in which he resides. If for a precinct committeeman, constable, a county office or member of the state legislature, said petition or petitions must have affixed thereto not fewer than five (5) nor more than ten (10) names of voters residing within the county and of the party of which the candidate is a member, provided, that a petition or petitions for a precinct committeeman, and constable must have affixed thereto not fewer than five (5) nor more than ten (10) names of voters residing within the precinct for which they are nominated. Each candidate for precinct committeeman, constable, a county office or member of the state legislature must have appended to his declaration of candidacy a certificate in the following form, to-wit:

State of Idaho, )
) ss:
County of )

I do solemnly swear (or affirm) that I am a qualified elector of the State of Idaho and a legal resident of the county of and that I am a member of the party; that each of the persons whose name is affixed to the above paper signed the same personally,

together with his post office address and the date of signing, and that he signed the same with full knowledge of its contents; that to the best of my knowledge he is a qualified elector of the State of Idaho and is a member of the party, that I intend to support the candidate named in such petition at the nominating election, and in good faith to support the candidates, generally, at the next general election of the party, of which the candidate named in the petition is a member.

Subscribed and sworn to before me this day of , .

Notary Public

Provided, that a candidate for the office of justice of the Supreme Court or for office of district judge shall make and file his declaration of candidacy as provided by chapter 7 of this title, and other nonpolitical candidates shall file no declaration of party affiliation in their declaration of candidacy and the petition or petitions supporting their nomination shall declare that the petitioners are not supporting their candidacy as members of any political party and their declaration of candidacy for office shall be substantially in the following form, to-wit:

I, the undersigned, being a qualified elector of . Precinct of County, State of Idaho, hereby declare myself to be a candidate for the office of

. . . . . to be voted for at the nominating election to be held on the day of , 19 , and certify that I possess the legal qualifications to fill said office and that my post office address is .

(Signed)

Section 3. That Section 34-608, Idaho Code, be, and the same is hereby amended to read as follows:

34-608. FEE FOR FILING — AMOUNT — TO WHOM PAYABLE.—The fee to be paid by or on behalf of a candidate shall be the sum of two dollars ($2.00) if he is a candidate for an office the salary of which is $300.00 or less per annum; when such salary exceeds the sum of $300.00 per annum an additional sum equal to one per cent (1%) thereof on such excess.

Said fees are to be paid to the following officers, to-wit: When the candidacy is for a congressional, state or district office embracing more than one county, the fee shall be paid to the secretary of state to be paid by him to the state treasurer and when for district offices of districts containing more than one county the same shall be divided equally between the counties composing such districts and paid to the respective treasurers thereof, and the secretary of state shall issue all necessary warrants for such payments on the state treasurer. When a candidacy is for *state senator or other than multicounty representative district of* a county office such fees shall be paid to the county auditors, and by them paid to the respective county treas-

urers. Provided, no fee shall be paid by or on behalf of any candidate for precinct committeeman, justice of the peace or constable.

SECTION 4. That Section 34-612A, Idaho Code, be, and the same is hereby amended to read as follows:

34-612A. CERTIFICATION OF CANDIDATES BY SECRETARY OF STATE AND COUNTY AUDITOR AND MEETING OF COUNTY ASSEMBLY. —Not less than five (5) days before the county assembly meets, the secretary of state shall mail or deliver personally to the county chairman of each political party in each county a certified copy of all declarations of his party for the office of United States senator, United States representative, governor, and any other state office, and the county auditor shall not less than five (5) days before the county assembly meets mail or deliver personally to the county chairman of each political party in each county a list of the *state senator, state representative or* county offices for which no candidate of his political party has filed.

The county assembly of each political party shall meet at 8:00 P.M. on the third Friday of May of each year in which a general election is held. The members of the county central committee of the respective political parties shall make up the county assembly and shall meet at a place at the county seat designated by the county chairman. The county chairman shall preside at the meeting but shall have no vote except in case of a tie. The assembly shall vote by roll call ballot

alphabetically and all action taken shall be by majority vote; provided, however, that no action of the county assembly shall be taken unless at least fifty-one per cent (51%) of the precincts in the county are represented in person by the precinct committeeman at said assembly and no proxies shall be allowed, and the assembly shall have the following powers:

a. To nominate county candidates *for state senator, state representative or county offices* where no candidate has filed for said office at the time said assembly is held. The county assembly shall certify any nomination made by them for ~~county~~ *such* office to the county auditor of their county, and upon the payment of the required fee, the name of any candidate so nominated shall be placed upon the county primary ballot.

b. To elect delegates to the state assemblies of their respective political parties. Each county shall have as many delegates as it has legislative seats in the state senate and house and in addition thereto shall have one (1) additional delegate for each 2,000 or major fraction of votes of that political party cast for the office of United States representative at the last primary election. The county chairman, state committeeman and state committeewoman and the incumbent legislators of the respective party shall be delegates to the state assembly and be in addition to the number of delegates allowed each county hereinabove. The county assembly may elect as many alternate delegates as it has delegates. The county chairman and secretary of

the respective assemblies shall certify immediately after adjournment to the state chairman of their respective political parties the names of the delegates and alternate delegates who have been chosen to represent the county at the state assembly. The state chairman shall, not less than ten (10) days before the meeting of the county assembly, certify to each county chairman of the respective political parties the number of delegates his county has been allotted for the coming state assembly of that political party.

SECTION 5. That Section 34-634, Idaho Code, be, and the same is hereby amended to read as follows:

34-634. DETERMINATION OF TIE. — Should two (2) or more candidates for a nonpolitical office or two (2) or more candidates of a political party receive the same number of votes for the same office the tie shall be determined by lot by such candidates; if for *state senator or other than multicounty representative district or* a county office, in the presence of the county canvassing board; and if for a district or state office, United States senator or representative in Congress, before the state canvassing board.

SECTION 6. That Section 34-636, Idaho Code, be, and the same is hereby amended to read as follows:

34-636. CERTIFICATION OF RESULT BY COUNTY COMMISSIONERS. — As soon as the returns are received and not later than the third day after the nominating election, ~~either regular or run-off~~, the

board of county commissioners shall meet as a board of canvassers, and canvass and make abstracts of the votes for the respective candidates for the different offices, and shall certify to the secretary of state the number of votes received in such county by all candidates for United States senator, representative in Congress and state and district offices, *state senator and state representative nominated by such county political subdivision or representative district political subdivision*, ~~provided that in the event of a run-off nominating election such certification to the secretary of state shall be only for the offices and candidates involved in such run-off election~~.

Said board shall certify to the county auditor the names of persons nominated by the different parties for the respective offices to be voted for at the ensuing general election in such county only.

SECTION 7. That Section 34-637, Idaho Code, be, and the same is hereby amended to read as follows:

34-637. CERTIFICATION OF RESULT BY STATE BOARD OF CANVASSERS.—For the purpose of canvassing the results of the nominating elections as herein provided, the state board of canvassers shall meet at the office of the secretary of state at ten (10) o'clock in the forenoon of the eleventh day after the nominating elections and said board shall canvass the votes for candidates for United States senator, representatives in Congress, state and district offices, *state senators nominated by each county political subdivision, and state representatives* when such offices are

voted upon at the primary election, and shall certify the nominees of the different parties nominated at the state primary election to the secretary of state, not less than thirteen (13) days after the nominating election.

SECTION 8. That Section 34-646, Idaho Code, be, and the same is hereby amended to read as follows:

34-646. PUBLICATION OF NOMINATIONS — ~~POSTING OF NOTICES IN RUN OFF NOMINATING ELECTIONS.~~ Within thirteen (13) days after a nominating election ~~whether regular or run off,~~ the secretary of state shall certify to the county auditor of each county the name and description of the persons nominated as candidates for whom the electors in each county *political subdivision* may vote, as specified in the certificates of nomination filed with the secretary of state. ~~except that when a run-off election is required, the secretary of state shall certify to said auditors only the names and descriptions of the persons and offices involved in such run-off election~~ As soon as the county auditor shall have received the information *herein* required to be certified to him by the secretary of state, *including the candidates from the several county political subdivisions within that senatorial district or single or multirepresentative district as the case may be* ~~as provided in the section next preceding,~~ it shall be his duty to compile in ballot form the information contained in said certificate, together with the information contained in all certificates of nomination to county and precinct officers which may be filed with him as the nominees to be voted on at the next succeed-

ing general election and cause the same to be published in two (2) issues of a newspaper published or distributed in such county. Said publications and notices shall be, as far as possible, in the form in which said nominations shall appear upon the official ballot *as provided in Chapter 9 of this Title.* In making said publications and notices county auditors shall keep in view the object of giving information, as far as possible, to the largest number of voters of all political parties.

~~The county auditors of each county in which a run-off election is to be held shall cause to be prepared a notice containing the names and addresses of all candidates running in said run-off primary under the proper designation and title of each office, giving the date of the run-off nominating election to be held to nominate such candidate for such office, the hours during which the polls will be open, and that the nominating run-off election will be held at the regular polling place in each precinct and the names of the candidates for each office shall appear in alphabetical order according to the first letter of the surname; and said auditor shall cause copies of said notice to be posted not less than five days (5) days before such run off nominating election as follows: one (1) at or near each post office situated in said county; one (1) at or near the front door of the county court house; and five (5) in five (5) public places in said county which are most likely to give notice to the voting public. No further notice of a run-off election shall be required.~~

SECTION 9. That Section 34-648, Idaho Code, be, and the same is hereby amended to read as follows:

34-648. FILLING VACANCIES IN NOMINA-

TIONS.—Should any person nominated die before the printing of the ticket or decline the nomination as in this act provided, or should any certificate of nomination be or become insufficient or inoperative from any cause, or if the original nomination was made by a party convention which had delegated to a committee the power to fill vacancies, the vacancy or vacancies thus occasioned may be filled in the following manner: The proper committee may, upon the occurring of such vacancies, proceed to fill the same. The chairman and secretary of such committee shall thereupon make and file with the proper officer, a certificate setting forth the cause of the vacancy, the name of the person nominated, the office for which he was nominated, the name of the person for whom the new nominee is to be substituted, the fact that the committee was authorized to fill vacancies, and such further information as is required to be given in an original certificate of nomination. The certificate so made shall be executed in the manner prescribed for the original certificate of nomination, and shall have the same force and effect as an original certificate of nomination. When such certificate shall be filed with the secretary of state, he shall, in certifying the nomination to the various county auditors, insert the name of the person who has thus been nominated to fill a vacancy in place of that of the original nominee; and in the event he has already sent forth his certificate, he shall forthwith notify the auditors of the proper counties of the name and description of the person so nominated to fill a vacancy the office he

is nominated for, the party or principles he represents and the name of the person for whom such nominee is substituted.

*In the case of a vacancy in a multicounty state representative district the state political party chairman shall call a meeting of the involved county electorial committees at a time and place certain within the multicounty representative district any time before the sixtieth day prior to the general election for the purpose of filling such vacancy.*

SECTION 10. That Chapter 9 of Title 34, Idaho Code, be, and the same is hereby amended by adding a new section thereto, to be known and designated as Section 34-904A, and to read as follows:

*34-904A. PROVISION FOR SENATORIAL DISTRICTS ON BALLOT.—On the ballot just below the state elective offices there shall be provided a space for the "Senatorial District # ...." in a size of type not smaller than long primer capitals, setting forth each of the county political subdivisions and the certified senatorial candidates under each named county political subdivision belonging to that particular senatorial district.*

*The face of the portion of the ballot for senatorial districts shall be in substantially the following form:*

| SENATORIAL DISTRICT # | | SENATORIAL DISTRICT # | | SENATORIAL DISTRICT # | |
|---|---|---|---|---|---|
| XYZ County For Senator JOHN DOE | ☐ | XYZ County For Senator RICHARD ROE | ☐ | XYZ County For Senator | ☐ |
| ABC County For Senator JOHN ZILCH | ☐ | ABC County For Senator JOE ZILCH | ☐ | ABC County For Senator | ☐ |
| TRD County For Senator JOHN BROWN | ☐ | TRD County For Senator JOE WHITE | ☐ | TRD County For Senator | ☐ |
| BLR County For Senator JANE LOW | ☐ | BLR County For Senator MARY BOW | ☐ | BLR County For Senator | ☐ |

# SENATE BILL No. 11

SECTION 1. That Section 67-202, Idaho Code, be, and the same is hereby repealed.

SECTION 2. That a new section is hereby enacted, to be known and designated as Section 67-202, and to read as follows:

67-202. SENATORIAL DISTRICTS.—It is hereby recognized that Idaho is a large and thinly populated mountainous state which from its origin has developed basic law with heavy reliance upon the political subdivisions of county government; further, it is recognized that the future development of Idaho dictates that no violence be done to this historic concept of govevrnment. At the same time it is the policy of the state of Idaho, in order to represent the population on an equitable basis, that state senatorial districts be maintained wherein the election of senators as provided by Article 3, Section 2, of the Idaho Constitution shall be as nearly equitable as possible among all the voters of the state.

In compliance with the 14th Amendment to the Constitution of the United States and with Article 3, Section 2 of the Constitution of the state of Idaho, and based upon the decennial federal census of 1960, the following senatorial districts are hereby created:

DISTRICT 1 shall consist of the counties of Bingham, Bonneville, Jefferson, Madison, Teton, Fremont, Clark and Lemhi and shall elect eight senators.

DISTRICT 2 shall consist of the counties of Bannock, Caribou, Bear Lake, Franklin and Oneida and shall elect five senators.

DISTRICT 3 shall consist of the counties of Gooding, Lincoln, Jerome, Minidoka, Twin Falls, Cassia and Power and shall elect seven senators.

DISTRICT 4 shall consist of the counties of Valley, Custer, Butte, Blaine, Camas, Elmore, Ada and Boise and shall elect eight senators.

DISTRICT 5 shall consist of the counties of Owyhee, Canyon, Gem, Payette, Washington and Adams and shall elect six senators.

DISTRICT 6 shall consist of the counties of Idaho, Lewis and Nez Perce and shall elect three senators.

DISTRICT 7 shall consist of the counties of Clearwater and Latah and shall elect two senators.

DISTRICT 8 shall consist of the counties of Shoshone and Benewah and shall elect two senators.

DISTRICT 9 shall consist of the counties of Kootenai, Bonner and Boundary and shall elect three senators.

There shall be nominated from each of the forty-four county political subdivisions, one senator candidate from each political party as provided by Title 34, Chapter 6, Idaho Code.

Each qualified voter in a senatorial district shall be entitled to cast one vote for a candidate for senator from each county political subdivision within such senatorial district.

A majority of the ballots cast at the general election by the entire senatorial district as between the candidates of each respective county political subdivision shall elect one senator from each such county political subdivision.

SECTION 3. In the event the Constitution of the United States is amended to permit apportionment of one house of the legislature upon factors other than population only, this act shall no longer be in effect and Section 67-202, Idaho Code, as it existed prior to the enactment hereof, shall thereafter be in full force and effect.

SECTION 4. In the event that Section 3 hereof shall be found by any court of competent jurisdiction to be invalid, the remaining provisions hereof shall not be affected and shall be and remain in full force and effect.

SECTION 5. An emergency existing therefor, which emergency is hereby declared to exist, this act shall take effect and be in full force and effect from and after its passage and approval.